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# TABLE OF CASES REPORTED AND NOTED IN THIS VOLUME.

	PAGE		PAGE
<b>A.</b>		<b>Campbell v. Chapman</b> .....	
<b>A. B. &amp; C., re Attorneys</b> .....	142	<b>Campbell, Re</b> .....	88
<b>Abell v. Kronkhite</b> .....	58	<b>Campbell v. Spurgeon</b> .....	226
<b>Adams v. Woodland</b> .....	263	<b>Canada Fire Insurance Co. v. North-</b>	
<b>Allen v. McTavish</b> .....	56	<b>ern Insurance Co</b> .....	110
<b>Allen v. The Edinburgh Life Assur-</b>		<b>Cerriby v. Wells</b> .....	170
<b>ance Co.</b> .....	85	<b>Charteris, Re</b> .....	88
<b>Anderson v. Muskoka Mill and Lum-</b>		<b>Church v. Fenton</b> .....	82
<b>ber Co</b> .....	58	<b>Churcher v. Bates</b> .....	80
<b>Anger v. Thompson</b> .....	173	<b>Clark v. Clifford</b> .....	169
<b>Angers v. Queen Insurance Co.</b> .....	53	<b>Clementson v. Grand Trunk Railway</b>	
<b>Armson v. Thompson</b> .....	20	<b>Co</b> .....	18
<b>Attorney-General v. Walker</b> .....	214	<b>Cleverdon, Re, v. Martin Insolvents</b> ...	217
<b>B.</b>		<b>Close et al. v. Beatty et al.</b> .....	114
<b>Bacon v. Hayes</b> .....	111	<b>Colburn et al. v. Mayor of Chattanooga</b>	250
<b>Bank of Ottawa v. Harrington</b> .....	113	<b>Collins v. Martin</b> .....	163
<b>Bank of Toronto v. McDeugall</b> ..	60	<b>Collins, Re, v. Water Commissioners of</b>	
<b>Barber v. Maughan</b> .....	21	<b>Ottawa</b> .....	60
<b>Beigle v. Duke</b> .....	23	<b>Consolidated Bank v. Cameron</b> .....	223
<b>Benson v. Ottawa Agricultural Insur-</b>		<b>Coulton, Re, an Insolvent</b> .....	217
<b>ance Co</b> .....	16	<b>Coy v. Coy</b> .....	85
<b>Bickford v. Great Western Railway Co</b>	115	<b>Craig v. Craig</b> .....	118
<b>Black v. Mottashed</b> .....	28	<b>Craig v. Milne</b> .....	86
<b>Black v. Reynolds</b> .....	218	<b>Crain v. Trustees of Collegiate Institute</b>	
<b>Blackburn v. Lawson</b> .....	15	<b>of Ottawa</b> .....	221
<b>Blasden v. Baldwin et al</b> .....	174	<b>Curry v. Curry</b> .....	247
<b>Boice v. O'Loane</b> .....	83, 215	<b>Currie v. Hodgins</b> .....	120
<b>Bottom v. Keefer</b> .....	118	<b>D.</b>	
<b>Boyce et al. v. O'Loane</b> .....	83, 215	<b>Dalby v. Humphrey</b> .....	276
<b>Brooks, Re and the Corporation of the</b>		<b>Darragh v. Ewin</b> .....	171
<b>County of Haldimand</b> .....	213	<b>Davis v. Vandicar</b> .....	19
<b>Broughton v. Smallpiece</b> .....	88	<b>Denham v. Brewster</b> .....	222
<b>Brown v. Great Western Railway Co.</b>	139	<b>Dennison v. Ginty</b> .....	225
<b>Brown v. Morrow</b> .....	218	<b>Dennison v. Smith</b> .....	245
<b>Brown v. Winning</b> .....	221	<b>Denny v. Montreal Telegraph Co</b> .....	119
<b>Brown v. Corporation of Town of Dun-</b>		<b>Dillares v. Doyle</b> .....	219
<b>das</b> .....	120	<b>Donnelly v. Crosby</b> .....	57
<b>Bryson v. Huntingdon</b> .....	85	<b>Douglas, Re</b> .....	214
<b>Bulder v. Kerr</b> .....	169	<b>Douglas v. Chamberlain</b> .....	88
<b>Bunker v. Emmanu</b> .....	115	<b>Doyle v. Carroll</b> .....	24
<b>Burgess v. Bank of Montreal</b> .....	213	<b>Driffill v. McFall</b> .....	120
<b>Burgess v. Bank of Montreal</b> .....	22	<b>Duit v. Cossett</b> .....	170
<b>Burnham v. Waddell</b> .....	26	<b>Dunnett v. Forneri</b> .....	84
<b>Burns v. City of Toronto</b> .....	119	<b>Dynes v. Batles</b> .....	264
<b>Burns v. Chamberlain</b> .....	20	<b>E.</b>	
<b>C.</b>		<b>Eaton v. Boissonault, 5 Rep</b> .....	270
<b>Cameron v. Gilchrist et al.</b> .....	245	<b>Erly, Re</b> .....	145
<b>Cameron v. Kerr</b> .....	216	<b>Essex v. Rochester</b> .....	81
<b>Cameron et ux. v. Wait</b> .....	215	<b>F.</b>	
		<b>Fair, Re, &amp; Bell</b> .....	144

	PAGE		PAGE
Fields v. Rutherford.....	245	Law v. Hand in Hand Mutual Insurance Co.....	223
Finnegan v. Keenan.....	123	Lawson v. Laidlaw et ux .....	216
Fitzgerald v. Grand Trunk Railway Co .....	225	Lee v. Wright .....	321
Fitzhenry v. Murphy .....	22	Leeming v. Smith .....	86
Fleury v. Fleming.....	297	Leprohon v. Ottawa .....	117
Fleury v. Pringle .....	322	Leys v. Hollingshead .....	222
Foley v. Foley.....	321	Lincoln Election, Re .....	21, 111, 112
Ford v. Gourlay.....	113	Ling v. Smith .....	87
Forrester v. Campbell .....	247	Little v. Lines .....	28
Frazer v. McFarlane.....	220	Locke v. Lewis .....	278
G.		Loucks v. McSloy .....	223
Gaylor v. Morrison.....	321	Lucas v. Moore .....	219
Gibron v. City of Ottawa .....	23	M.	
Gillespie v. Robertson .....	28	Mace, Re, v. County of Frontenac....	17
Ginty v. Rich .....	168	Machar v. Vandewater.....	321
Good v. Martin .....	107	Mason v. Bickle et al .....	58
Gordon v. Adams .....	119	Mason v. Borroughes et al .....	263
Gosfield v. Rochester.....	81	May v. Middleton .....	117
Gould v. Stokes.....	297	Mayle, In re, and the City of Kingston	221
Gowans v. Consolidated Bank.....	221	Meakin v. Sampson et al.....	83
Graham v. McKernan .....	82	Mechanics' Building and Savings Society v. The Gore Mutual Insurance Co.....	216
Gunn v. North .....	119	Meighen v. Buell .....	248
H.		Merchants' Bank v. Bostwick ....	116, 218
Hagarty v. Squire .....	17	Mersa v. Rochester .....	81
Halcrow v. Kelly .....	121	Miller v. Miller .....	86
Hall v. Evans .....	23	Minister of Education, Re, and the Public School Boards of Macaulay and Bracebridge .....	246
Hamilton, Township of, v. Stevenson..	87	Mitchell v. Mullholland .....	55
Harper Wilson, In re, an Insolvent ..	13	Morris v. Hoyle.....	224
Herbert v. Mercantile Insurance Co...	220	Morton, Re, an Insolvent.....	217
Holt v. Carmichael .....	174	Munro v. Smart.....	248
I.		Murphy v. Thompson .....	23
Inglis v. Beatty.....	109	Mc.	
J.		McArthur v. Eagleson .....	209, 219
Jameson v. Laing .....	172	McArthur v. Township of Southwold...	246
Jenkins v. Strong .....	115	McCormack v. Bullivant .....	85
Johnson v. Hogg .....	87	McDonald v. Notman .....	264
Johnson v. St. Andrews Church.....	42	McDonald v. Reid.....	20
Johnson v. The Canada Farmers Mutual Insurance Co .....	19	McDougall v. Waddell (Sheriff).....	18
Johnson v. Wilson.....	114	McDougall v. Campbell .....	213
Jones, Re .....	145	McEdwards, Assignee, v. Palmer .....	109
K.		McEdwards v. McLean .....	222, 253
Kerry et al. app. and Les Sœurs de l'Asile de la Providence .....	264	McMaster v. King .....	79, 80, 212
Kidd v. O'Connor .....	121	McNabb v. McInnes.....	20
Kilborne v. Russ .....	26	N.	
Killam, In re, Ex parte .....	242	Nasmith v. Dickey et al .....	60
L.		Nasmith v. Ginty .....	226
La Banque Nationale v. Sparks.....	57	Nasmith v. Manning.....	226
Laidlaw v. Jackes .....	84	Newman v. Ginty .....	225
Langford v. Kirkpatrick et al .....	117	Nichol v. Ewin .....	171, 283
Lawrence v. Ketchum ..	83	Nordheimer v. Robinson .....	57
		Northwood v. Rennie .....	215
		Norval v. Canada Southern Railway Co.....	24

## TABLE OF CASES REPORTED AND NOTED.

O.	PAGE	Regina, Ex rel. Taylor v. Stevens . . .	PAGE
O'Connor v. Beatty . . . . .	110	S.	
O'Connor v. Dunn . . . . .	13	Sadlier v. Smith . . . . .	30
O'Connor v. McNamara . . . . .	247	Samis v. Ireland . . . . .	114
O'Donohoe v. Wiley . . . . .	221, 283	zams et al. v. Gore District Insurance	
O'Donohoe v. Wilson . . . . .	22	Co . . . . .	42
Oliver et al. v. Great Western Railway		Sanborn, Re., an Insolvent . . . . .	241
Co . . . . .	18	Samuels v. Colter . . . . .	25
Ontario Bank v. Sirr . . . . .	59	Schlesinger v. Davis . . . . .	112
Ontario Bank v. Wilcox . . . . .	222, 253	Shannon v. Gore District Insurance	
Ostrom v. Palmer . . . . .	916	Co . . . . .	332
Owston v. Grand Trunk Railway Co. .	297	Shultz v. Reddick . . . . .	121
P.		Sly v. Ottawa Agricultural Insurance	
Parkinson v. Clendenning . . . . .	223	Co . . . . .	224
Parson v. Citizens' Insurance Co. . . . .	220	Smith v. Elliott . . . . .	264
Parsons v. Queen's Insurance Co. . . . .	220	Smith v. Hutchinson . . . . .	110
Parsons v. Victoria Mutual Insurance		Smith v. McLandress . . . . .	248
Co . . . . .	224, 245	Smith v. Smith . . . . .	87
Peers v. Byron . . . . .	27	Stadacona Insurance Co. v. McKenzie	224
Pegg v. Nasmith et al . . . . .	26	Standard Bank v. Boulton . . . . .	215
Petition of Minister of Education, Re. .	27	Stavely v. Perry . . . . .	15
Petrolia Crude Oil Co. v. Englehart . .	246	Steinhoff v. Royal Canadian Insurance	
Ploves v. Maughan . . . . .	21	Co . . . . .	17
Pollock's Administrator v. Louisville. .	261	Stevens v. Buck . . . . .	119
Pringle v. Corporation of Town of		Sweeney v. Sweeney (1 R. 10 C. L.,	
Napanee . . . . .	219	375) . . . . .	2
Provincial Insurance Co. v. Gooderham	121	Sylvester et al. v. McCuaig . . . . .	144
Q.		St. Michael's College v. Merrick . . . .	248
Queen Insurance Co. v. Devinney . . . .	174	T.	
R.		Taylor v. Parnell . . . . .	112
Ralph v. Great Western Railway Co. .	172	Thistle v. Union Forwarding Co. . . . .	225
Ramsay v. Stafford . . . . .	27	Thomas v. American Express Co. . . . .	56
Rees v. Fraser . . . . .	84	Thompson et al. v. Dickson . . . . .	27
Revell, Re, v. The County of Oxford. .	16	Tompson Executors v. Tomppert . .	326
Ridgway v. Corporation of Toronto . .	222	Trotter v. Toronto Water Works Com-	
Robertson v. Robertson . . . . .	85	mission . . . . .	168
Robertson, Re . . . . .	85	Trust & Loan Co. v. McGillivray . . . .	143
Robinson v. Fee . . . . .	80	Tylee v. Hinton . . . . .	17
Rogers v. Hagard . . . . .	117	U.	
Roebottom v. Counties of Northumber-		Ulrick v. National Insurance Co . . . . .	17
land and Durham . . . . .	82, 113	V.	
Ross v. Eby . . . . .	24	Vandicar v. Oxford . . . . .	214
Royal Canadian Bank v. Kelly, 19 C.P. 196,		Vansickle v. Kelly . . . . .	23
430; 20 C.P. 519; in Appeal 22 C.P.	279	W.	
Regina v. Amor . . . . .	81	Wakefield v. Newell . . . . .	248
Regina v. Gloucester and Ottawa Rail-		Walker v. Terry . . . . .	170
way Co. . . . .	82	Walker, Re . . . . .	21
Regina v. Haines et al . . . . .	22	Wallace v. Great Western Ry. Co. . . . .	213
Regina v. Lake . . . . .	16	Walls, Re, & Co. . . . .	108
Regina v. Lawrence . . . . .	112	Wambold v. Foote . . . . .	173
Regina v. Nasmith . . . . .	22	Watts v. Hobson . . . . .	170
Regina v. Prettie . . . . .	118	Welsh v. Ouillette . . . . .	58
Regina v. Mrs. Philip William . . . . .	82	Werner v. Sibbald . . . . .	144
Regina v. Smith . . . . .	219	Wealoh v. Brown . . . . .	218
Regina v. Sutton . . . . .	17		
Regina v. Wilkinson . . . . .	16, 81		
Regina, Ex rel. Haner v. Roberts . . . .	144		





# TABLE OF CASES

## NOTED IN DIGEST OF ENGLISH LAW REPORTS.

A.	PAGE.		PAGE
Aberdeen Town Council v. Aberdeen University	183	Borrowman v. Drayton	64
Adams v. Angell	180	Boucicault v. Chatterton	147
Adnam v. Earl of Sandwich	182	Boulter, In re	65
Agincourt, The	198	Bonnewell v. Jenkins	300
Alexander, Ex parte	66	Bowes v. Shand	176
Allen v. Bewsey	269	Bradburn v. Morris	128
Allkins et al. v. Jupe	178	Braddock, In re, Goods of	128
Andrews, Ex parte	66	Braham v. Beachin	328
Andrews' Trusts, In re	266	Brentwood Brick and Coal Co., In re	128
Angus v. Dalton	269	Brett, Ex parte	266
Armitage, In re	152	Bright v. Tyndall	125
Armitage v. Wilkinson	274	Brogden v. Metropolitan Railway Co.	196
Ashton v. Stock	196	Brooks v. Drysdale	268
Ashworth v. Outram	177	Brown, In re, the Goods of	156
Atkinson v. Newcastle Waterworks Co	182	Brown v. Great Eastern Railway Co.	158
Attorney-General v. Duke of Northumberland	299	Bullocks v. Corry	299
Austin v. Austin	127	Butler v. Butler	155, 273
Austin v. Boyce	127		
		C.	
B.		Cadett v. Earle	175
Baker, Ex parte	146	Caldocott, Ex parte	61
Bangham, In re, Goods of	128	Campbell's Policy, In re	201
Barber v. Wood	147	Cannon v. Villars	329
Barker v. Cox	127	Capper, Ex parte	128
Berthier, Ex parte	301	Cardross's Settlement, In re	301
Barrow, Ex parte	201	Cargo ex Sarpadon	327
Bathurst v. Errington	196	Catling v. King	182
Bathurst v. Stanley	196	Chapman v. Chapman	145
Beale, In re	61	Chatterton v. Cave	64, 300
Bellis' Trusts, In re	147	Cheavin v. Walker	182
Bellman, In re	146	Clark v. Adie	181
Bennett v. Houldsworth	201	Clark v. Chambers	303
Bentham v. Hoyle	325	Clark v. Molyneux	327
Bentinck v. Duke of Portland	272	Clements v. Norris	323
Besant v. Cox	197	Cohen v. South Eastern Ry. Co.	62
Bessela v. Stern	148	Cohen v. Hale	299
Berry v. Berry	268	Cole v. Hawes	61
Bennett, In re	175	Cole v. Manning	171
Berghem v. The Great Eastern Railway Co	324	Collengridge v. Royal Exchange Ass. Corporation	270
Bilborough v. Holmes	152	Coleman, In re, v. Jarrom	65
Bissicks, Ex parte	201, 327	Cooke, Ex parte	125
Bissicks v. Bath Colliery Co.	201, 327	Cooke's Contract, In re	127
Blakemore, Ex parte	153	Cooper v. Macdonald	268
Blackwell, In the Goods of	156	Corbridge, Ex parte	61
Bolland, Ex parte	326	Cornforth Hæmatite Iron Co	64
Bond, In re	61	Cox, In re	271
Boosey v. Fairlie	268	Cox v. Davie	271
		Cox v. Rabbits	327
		Corporation of Birmingham v. Allen	195

	PAGE		PAGE
Craven v. Stanley.....	63, 196	Governors of Magdalen Hospital v. Knotts.....	154
Croughton's Trusts, In re.....	303	Greaves v. Greenwood et al.....	148
Croydon Commercial Gas Co. v. Dickinson et al.....	125	Green v. Carlill.....	149
Cundy v. Lindsay.....	325	Greenwood v. Greenwood.....	183
Cynthia, The.....	62		
		H.	
D.		Hampshire v. Wickens.....	268
Davey v. Ward.....	328	Hancocks v. Demerio-Lablache.....	301
Davis v. Merceron.....	63	Hampton v. Holman.....	146
Davis v. Jenkins.....	198	Hand v. Halt.....	150, 179
Davies v. London and Provincial Mar. Ins. Co.....	327	Harrison v. Jackson.....	266
Dawe's Trusts, In re.....	65	Hart v. Swaine.....	197
Dawson v. Bk. of Whitehaven.....	65, 197	Hart et al. v. Wall.....	150
Dean v. McDowell.....	323	Hatfield v. Minet.....	298
De Barros v. De Barros.....	150	Hayman, Ex parte.....	324
De Bussche v. Alt.....	324	Hedgman, In re.....	329
Delhasse, Ex parte.....	271	Henley, In re.....	126
Dempsey v. Lawson.....	156	Harvey-Bathurst v. Stanley.....	63
Dench v. Dench.....	156	Higginson v. Simpson.....	63
De Rosaz, In the Goods of.....	156	Higham v. Wright.....	175
Dickson v. Reuter's Tel. Co.....	126, 202	Hill, Ex parte.....	195
Dixon, Ex parte.....	126	Hindhaugh v. Blakey.....	266
Drake, Ex parte.....	176	Hincks, In re.....	301
Dudgeon v. Pembroke.....	149	Hodges, In re.....	328
Duke of Northumberland v. Todd.....	327	Hope v. International Financial Society.....	127
		Hopkins et al. v. Great Northern Railway Co.....	149
E.		Howard, In re.....	200
Edwards v. West.....	302	Hudson v. Buck.....	272
Erminia Foscolo, The.....	66	Hudson v. Tabor.....	152
Ealick, In re.....	66	Hughes v. Metropolitan Railway Co..	179
Evangelistria, The.....	198	Hughes v. Pritchard.....	204
Everett v. Everett.....	204, 273	Hugo, In the Goods of.....	156
Evershed v. Lond. and N. W. Ry. Co.....	153, 272	Humphries v. Cousins.....	151
Eykyn's Trusts, In re.....	198	Hunt v. Wimbledon Local Board.....	300
Eyston, Ex parte.....	265	Hurdman v. North Eastern Railway Co.....	301
		Hyde v. Warden.....	270
F.			
Faithful v. Ewen.....	266	I.	
Fells, In re.....	66	Imperial Bank v. London and St. Catharine's Dock.....	153
Frith v. Bowling Iron Co.....	323	Ince, In re, Goods of.....	156
Fletcher v. Smith.....	199	Inglis v. Battery.....	300
Foster v. Lesier.....	201	Irving, In re.....	266
Franconia, The.....	178	Isaac v. Wall.....	203
G.		J.	
Gabell v. South Eastern Ry. Co.....	174	Jackson v. Metropolitan Railway Co...	151
Gale v. Gale.....	200	James et al. v. Shrimpton et al.....	126
Gale v. Squier.....	64, 183	Jaques v. Millar.....	202
Gardner v. Gardner.....	200	Jefferys v. Fairs.....	126
General S. American Co., In re.....	267	Job v. Job.....	197
George, In re (an Infant).....	180	Johnson v. Credit Lyonnais.....	149
German v. Chapman.....	268	Johnson v. Lyttle's Iron Agency.....	177
Gibson, In re.....	326	Jones v. Davies.....	326
Girdleston v. Brighton Aquarium Co..	302	Jones v. Gordon.....	195
Gisborne et al. v. Gisborne et al... ..	155	Jones v. Heavens.....	64
Good, Ex parte.....	152	Jackson v. Metropolitan Railway Co..	151
Gordon, In re.....	203		

## K.

## PAGE

Kottengell, In re . . . . .	146
Kearley, In re, and Clayton's Contract	267
Keene v. Biscoe . . . . .	328
Keith et al. v. Burrows et al. . . . .	151, 199
Kemp v. Bird . . . . .	150, 179
Keppel v. Bailey . . . . .	268
Kerr's Trusts, In re . . . . .	61
Kerr v. Corporation of Preston . . . . .	198
Kevan v. Crawford . . . . .	201
King v. George . . . . .	61, 175
Kirk, Ex parte . . . . .	175
Kleinwork, Cohen & Co. v. Cassa Mari- tima, of Genoa . . . . .	61
Kronheim v. Johnson . . . . .	197

## L.

Lamb v. Walker . . . . .	301
Lancaster, Ex parte . . . . .	181
Lap v. Garret . . . . .	299
Leach v. Jay . . . . .	200
Leask v. Scott Brothers . . . . .	146
Leathes v. Leathes . . . . .	154
Leyman v. Latimer . . . . .	199
Limerick, The . . . . .	62
Lindsay et al. v. Crowdy et al. . . . .	126
Lohre v. Aitchinson . . . . .	178
London and Provincial Bank v. Boyle	301
Lord Cowley v. Byas . . . . .	178
Love, In re . . . . .	156
Lowndes v. Norton . . . . .	202
Luke v. South Kensington Hotel Co. . . . .	303

## M.

Mann, Ex parte . . . . .	146
Manson v. Thacker . . . . .	273
Mapleback, In re . . . . .	61
Marsden v. Kent . . . . .	177
Mason, In re . . . . .	298
Mason v. Robinson . . . . .	298
Master v. Hansard . . . . .	147
McKenzie v. Hesketh . . . . .	273
McKinnon v. Armstrong Bros . . . . .	181
McPherson v. Watt . . . . .	266
Meek v. Devenish . . . . .	197
Megevand, In re . . . . .	271
Merceron's Trusts, In re . . . . .	63
Merchants' Banking Co., of London, v. Phoenix Bessemer Steel Co . . . . .	156
Metropolitan Railway Co. v. Defries . . . . .	127
do do v. Jackson . . . . .	271
Mildmay v. Quicke . . . . .	200
Miller, In re . . . . .	195
Mills v. Haywood . . . . .	202
Mitchell's Trust, In re . . . . .	201
Monck v. Hilton . . . . .	126
Morgan v. Elford . . . . .	125
Morgan v. Minett . . . . .	195
Morgan v. Thomas . . . . .	204
Moore v. Hall . . . . .	265
Movell v. Cowan . . . . .	198, 269

Movies v. Bradburn . . . . .	123
Murphy v. Manning . . . . .	147

## N.

National Provincial Bank of England..	65
National Provincial Plate Glass Insur- ance Co. v. Prudential Insurance Co . . . . .	195
Nelson v. Liverpool Brewery Co . . . . .	179
Newbury's Trusts, In re . . . . .	182
Newby v. Sharpe . . . . .	302
Newman, In re . . . . .	147
Noble v. Edwards . . . . .	154
Norman v. Villars . . . . .	177
North British Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co . . . . .	178
Norton v. Florence Land and Public Works Co. . . . .	271

## O.

Oastler v. Henderson . . . . .	179
Odessa Tramway Co. v. Mendel . . . . .	300
O'Rourke v. Bolingbroke . . . . .	200
Orr-Ewing v. Colquhoun . . . . .	199

## P.

Parana, The . . . . .	64, 151
Paris Skating Rink Co., In re . . . . .	174
Parker v. South Eastern Railway Co. . . . .	174
Patrick v. Milner et al . . . . .	181
Patterson v. Gas Light and Coke Co. . . . .	271
Pearson v. Cox et al . . . . .	180
Pennington v. Brinsop Hall Coal Co. . . . .	177
Peter der Grosse, The . . . . .	61
Phoenix Bessemer Steel Co . . . . .	64
Pickergill v. Rodgers . . . . .	148
Pinny v. Hunt . . . . .	200
Pladda, The . . . . .	62
Platt v. Attorney-General of New South Wales . . . . .	269
Plympton v. Spiller . . . . .	200
Pooley v. Driver . . . . .	152
Price v. Jenkins . . . . .	175
Prince v. Oriental Bank Corporation . . . . .	267
Prudential Insurance Co. v. Edmonds . . . . .	177

## Q.

Queen v. Aspinall . . . . .	62
Queen v. Bradlaugh and Besant . . . . .	181
Queen v. Cooper . . . . .	177
Queen v. Flattery . . . . .	153
Queen v. Foster . . . . .	149
Queen v. Gale . . . . .	66
Queen v. Kenny . . . . .	149
Queen v. Langton . . . . .	148
Queen v. Richards . . . . .	151
Queen v. Rogers . . . . .	198
Queen v. Tatlock . . . . .	65

R.	PAGE		PAGE
Rolph v. Carrick .....	183	Teasdale v. Braithwait.....	181
Randall v. Newson .....	128	Tennant, Ex parte.....	200
Ranken v. Alfaro .....	176	Thompson v. Gardiner .....	62
Rayner v. Mitchell .....	180	Thompson v. Sunderland Gas Co .....	175
Readhead v. Midland Railway Co .....	128	Thompson v. Eastwood.....	155
Redfern, In re .....	204	Thrift v. Yule .....	175
Redfern v. Bryning .....	204	Travers v. Blundell .....	263
Reeve's Trusts, In re .....	145	Tully v. Howling .....	62
Roberts, In re.....	195	Tweddale v. Tweeddale .....	272
Robert v. Gordon .....	203	Twycross v. Drayfus .....	178
Robinson v. Price .....	149		
Robson v. North Eastern Railway Co., 2 Q. B. D .....	124	U.	
Rolls v. Pearce .....	175	Ungley v. Ungley .....	182
Rose v. North Eastern Ry. Co.....	125	Unsworth v. Speakman .....	62
Rossiter v. Miller .....	182		
Rourke v. White Moss Colliery Co....	150	V.	
Rumball v. Metropolitan Bank .....	125	Neales' Trust, In re .....	181
Rustomjee v. The Queen.....	125	Venables v. Smith .....	151
S.		W.	
Saner v. Bilton .....	302	Walters v. Woodbridge .....	273
Saunders v. Dunman .....	303	Ward v. Hobbs .....	153, 272
Schwerdtfeger, In the Goods of .....	66	Wardley, Ex parte.....	195
Shand v. Powes.....	63	Ware, In re.....	176
Shaw v. Ford .....	204, 269	Watson, Ex parte .....	156
Sheppard v. Beetham .....	196	West Cumberland Iron and Steel Co. v. Kenyon .....	199
Sibley's Trusts, In re .....	146	West of England and South Wales Bank v. Nicholls .....	199
Siddons et al. v. Short et al. ....	198	Wheatcroft, In re .....	195
Simpson v. Thompson .....	270	White, in re .....	195
Skeet v. Lindsay .....	154	White v. France .....	180
Smith v. Crabtree .....	204	Whiteley and wife v. Pepper .....	151
Smith's Trusts, In re .....	269	Widgery v. Tepper .....	149
Smith v. Widlake .....	203	Willans et al. v. Ayers et al .....	266
Snell, In re .....	181, 195	Williams, In re .....	179
Sottomayor otherwise De Barros v. De Barros .....	150, 270	Williams v. Jordan .....	197
Southwark and Vauxhall Water Co. v. Quick .....	299	Willis v. Kymer.....	273
Speakman, In re .....	62	Wilson v. Finch Hatton .....	150
Spike v. Bacon .....	198	Wilson v. Morley .....	179
Spike v. Harding .....	302	Winn v. Bull .....	198
Stanley v. Stanley.....	266	Winterfield v. Bradmen .....	300
Star of India, The.....	64	Wolverton Mortgage Estates, In re .....	273
Stead v. Millor .....	155	Woodley v. Metropolitan District Ry. Co. ....	267
Steel et al. v. State Line Steamship Co .....	266	Woolfe v. Horn .....	154
Stephens, Ex parte .....	269	Woolfe v. Pemberton .....	198
Strachan, In re .....	125	Worskell, Ex parte .....	202
Stringer's Estate .....	204		
Swire et al. v. Francis .....	272		
		Y.	
T.		Yearwood's Trusts, In re .....	147
Taunton v. Morris.....	303	Yglesias v. Mercantile Bank of the River Plate.....	266
Taylor, In re, an Infant .....	64		

# TABLE OF TITLES

CONTAINED IN DIGEST OF ENGLISH LAW REPORTS.

A	PAGE.		PAGE
Accessory.....	151	Copyright.....	64, 147, 267, 300
Adjacent Report.....	195	Corporation.....	300
Administration.....	156	Costs.....	300
Ambiguity.....	156	Co-trustee.....	155
Ancient Lights.....	195, 265	Covenant.....	64, 147, 196, 268
Annuity.....	145, 265, 298	Creditor.....	152
Anticipation.....	265	Custody of child.....	64
Appointment.....	61, 147, 266	Custody of deeds.....	154
Arbitration.....	298	Curtsey.....	268
Assignment.....	266		
Assignment of suit.....	174	D	
Attorney and Client.....	195, 266, 299	Damages.....	64, 300
Auction.....	154	Deed.....	64
		Demand.....	153
B		Demurrer.....	301
Bailment.....	174	Detinue.....	176
Bailor and Bailee.....	150	Devise.....	65, 147, 197, 268
Bankruptcy.....	61, 146, 152, 153, 195	Discretion.....	154
Banks and Banking.....	151	Distribution.....	65
Bequest.....	61, 145, 175, 195, 299	Domestic relations.....	149
Bill of lading.....	61, 145, 175, 266	Domicile.....	269
Bills and notes.....	146, 175, 266, 299	Dower.....	65, 197
Bottomry bond.....	61		
Breach of promise.....	148	E	
Broker.....	61, 153	Easement.....	147, 269
Burden of proof.....	148	Election.....	147, 197
By-law.....	153	Embezzlement.....	65
		Equitable charge.....	176
C		Estate for life.....	146
Carrier.....	153	Evidence.....	148, 176
Caveat emptor.....	153	Executors and administrators.....	66, 177, 197
Charter party.....	62	Execution.....	301
Class.....	62		
Codicil.....	156	F	
Collision.....	62	Factor.....	140
Commendation of goods.....	149	False pretences.....	149, 177
Common carrier.....	62, 153, 267	Ferry.....	149
Compensation.....	147	Fixtures.....	66, 269
Composition.....	267	Foreign judgment.....	66
Conditional will.....	156	Forfeiture.....	177
Condition of sale.....	154	Fraud.....	197
Consideration.....	145, 175	Frauds, Statute of.....	182, 197
Conflict of laws.....	150	Fraudulent preference.....	89
Conspiracy.....	62		
Construction.....	63, 146, 175, 196, 267	G	
Contract.....	63, 147, 175, 196, 267, 299	General average.....	149
Conveyance.....	64	Guaranty.....	269

	PAGE		PAGE
<b>H</b>		<b>Presumption</b> .....	200
<b>Husband and wife</b> .....	149, 177, 197, 301	<b>Principal and agent</b> .....	125, 272, 324
<b>I</b>		<b>Principal and surety</b> .....	125
<b>Infant</b> .....	89, 198, 270, 301	<b>Probate</b> .....	125, 200
<b>Injunction</b> .....	177, 198	<b>Proof of claim</b> .....	153
<b>Innkeeper</b> .....	89, 198	<b>R</b>	
<b>Insurance</b> .....	89, 149, 178, 270, 301	<b>Railway</b> .....	153, 272, 324
<b>J</b>		<b>Rape</b> .....	153
<b>Judgment</b> .....	302	<b>Realty and personalty</b> .....	200
<b>Jurisdiction</b> .....	178, 198	<b>Reversion</b> ..	200
<b>L</b>		<b>S</b>	
<b>Landlord and tenant</b> .....	89, 149, 178, 302	<b>Sale</b> .....	126, 153, 272, 325
<b>Lease</b> .....	89, 150, 179, 198, 270	<b>Salvage</b> .....	326
<b>Legacy</b> .....	179	<b>Seisin</b> .....	200
<b>Libel and slander</b> .....	89, 150, 199, 327	<b>Set off</b> .....	126, 181
<b>M</b>		<b>Settlement</b> .....	181, 200, 326
<b>Master and servant</b> .....	150, 180	<b>Sheriff</b> .....	201, 327
<b>Marriage</b> .....	150, 270	<b>Slander</b> .....	89, 150, 199, 327
<b>Marriage settlement</b> .....	90	<b>Solicitor</b> .....	181, 327
<b>Married women</b> .....	303	<b>Specific performance</b> .....	126, 201, 272
<b>Measure of damages</b> .....	151	<b>Spiritualism</b> .....	126
<b>Mine</b> .....	199	<b>Statute</b> .....	181
<b>Mortgage</b> .....	151, 180, 199, 271, 303	<b>Statute of frauds</b> .....	182
<b>Mortgagor and mortgagee</b> .....	90	<b>Statute of limitations</b> .....	154, 182
<b>Mortmain</b> .....	90, 271	<b>Stoppage in transitu</b> .....	202
<b>Murder</b> .....	151	<b>Surety</b> .....	327
<b>N</b>		<b>T</b>	
<b>Navigable river</b> .....	199	<b>Telegraph</b> .....	126
<b>Negligence</b> .....	124, 151, 180, 271, 303	<b>Trustee</b> .....	126
<b>Negotiable instrument</b> .....	125	<b>U</b>	
<b>Nuisance</b> .....	151	<b>Ultra vires</b> .....	127
<b>P</b>		<b>V</b>	
<b>Partnership</b> .....	91, 151, 199, 271, 323	<b>Vendor and purchaser</b> ...	127, 155, 183, 203, 273
<b>Patent</b> .....	91, 180, 271	<b>Vendor's lien</b> .....	156, 273
<b>Perpetuity</b> .....	272	<b>W</b>	
<b>Petition of right</b> .....	125	<b>Warranty</b> .....	128
<b>Power</b> .....	181	<b>Waiver</b> .....	328
<b>Pleading and practice</b> .....	125, 181	<b>Way</b> .....	128, 329
<b>Prescription</b> .....	152	<b>Will</b> .....	128, 156, 183, 203, 273, 329

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR JANUARY.

1. Tues. New Year's Day.
2. Wed.
3. Thur. Sittings of Oyer and Terminer, Toronto—Hagarty, C. J.
4. Fri.
5. Sat.
6. SUN. Epiphany. Christmas vacation in Chancery ends.
7. Mon. Municipal Elections held. Heir and Devisee Sittings begin. Co. Court Term begins.
8. Tues. Sittings of Assize, Hamilton—Galt, J.
9. Wed.
10. Thur. Postal cards first introduced into England, 1870.
11. Fri.
12. Sat. Sir Charles Bagot, Governor-General, 1842. County Court term ends.
13. SUN. 1st Sunday after Epiphany.
14. Mon. Sittings of Nisi Prius, Toronto—Hagarty, C. J.
15. Tues.
16. Wed.
17. Thur.
18. Fri.
19. Sat.
20. SUN. 2nd Sunday after Epiphany.
21. Mon. Sittings of the Supreme Court begin. First meeting of Municipal Council (except County Council).
22. Tues. County Councils hold first meeting. Primary Examinations—Written. Heir and Devisee sittings end.
23. Wed. Primary Examinations—Oral.
24. Thur.
25. Fri.
26. Sat.
27. SUN. 3rd Sunday after Epiphany.
28. Mon. Septuagesima.
29. Tues. Intermediate Examinations.
30. Wed. Intermediate Examinations.
31. Tues. Earl of Elgin, Governor-General, 1847. Examination for certificates of fitness.

## CONTENTS.

## PART I.

## EDITORIALS :

## PAGE

Fusion of Law and Equity .....	1
Plaintiffs in person .....	1
Distress Clauses in Mortgages .....	1
Landlord and Tenant—Notice to quit .....	2
Appointment of legal Juveniles .....	2
Law Students and Articled Clerks .....	2
The Supreme Court .....	3
The Revised Statutes of Ontario .....	4
Distress Clauses in Mortgages .....	8

## NOTES OF CASES :

Court of Appeal .....	18
Queen's Bench .....	16
Common Pleas .....	18
Chancery .....	20

## PART II.

(See page 21.)

## Canada Law Journal.

Toronto, January, 1878.

Our expectation that the Chancery side of the question, on the subject of the fusion of Law and Equity, discussed recently by "Q. C." would be strongly supported has not been disappointed. "Equity," and "Humble Stuff" come to the rescue and seem eager for the fray, saying to the man of silk: "Now, gallant Saxon, hold thine own." Belonging, as he does, to that exalted order, we leave him for the present to fight his own battle. The matter must, however, be argued on both sides on its merits, without reference to motives or prejudices. It is too important to be dwarfed or mystified by side issues.

The *Solicitors' Journal* draws attention to the fact that the "plaintiff in person" is fast becoming a serious nuisance in the Courts. Among other notorious instances, there is the case of Miss Sheddon, who occupied in her address before the House of Lords twenty-two days. Among the lesser offenders are classed Mr. Leonard Edmunds, who sued Mr. Gladstone and subpoenaed him as a witness; Mr. Jacobs who first sued Mr. Justice Mellor for false imprisonment, and next Mr. Justice Brett for libel; Mr. Cobbett who sued Mr. Justice Lindley for refusing a habeas corpus in the Tichborne case, and Mr. Henwood, who sued Mr. Childers for libel.

We publish in this issue a contribution to the Law of Real Property from the pen of Mr. Leith, Q.C., in relation to the distress clause in mortgages. It will be remembered that the judgment in Appeal, in the case of *Royal*



## EDITORIAL ITEMS—LAW STUDENTS AND ARTICLED CLERKS.

*Canadian Bank v. Kelly*, was prepared by the late learned Chief Justice of that Court, and delivered by him in 1870 (see 22 C. P. 283). This judgment was unfortunately lost shortly afterwards, and much inconvenience has been the result. Mr. Leith has, however, added another to the many obligations the profession are under to him in that important branch of the law on which he is such a high authority, by supplying the loss as far as possible, and by adding some useful observations and suggestions of his own.

In *Sweeny v. Sweeny*, I. R. 10 C. L. 375 is decided a point in the law of landlord and tenant which has been long *in dubio*. A tenant from year to year of a farm died intestate. For some time no letters of administration were obtained, and the widow meanwhile remained in possession. The majority of the Court held that a notice to quit could be validly served on the widow, on the ground of the inconvenience which would result if such a notice under the circumstances could not be effectively served on the person in actual possession.

We have before now alluded to a mania which is prevalent in this country, of passing over men of age and experience, and giving legal appointments (we are not now alluding to judicial appointments), to young men with the avowed object of giving them a helping hand in their profession. We are glad to say that we are not singular in our views. The *Law Times*, we notice, falls foul of something similar in England. It appears that Lord Justice Thesiger, when at the bar, was the Attorney-General to the Prince of Wales. His successor is a junior barrister, called in November, 1866. The writer having evidently in

his memory Mr. Thesiger's appointment to the Bench, thus comments:—"Youth seems at present to be no disqualification, but rather a recommendation for legal appointments. . . . The Heir Apparent ought to be careful not to make ridiculous appointments, but rather to surround himself with officers who will give dignity and importance to the offices which they hold." The Calcutta correspondent of the *Times* states that the appointment of a very young barrister to the position of Legal Secretary to the Government of India was received with great indignation, and has been cancelled. It would appear, therefore, that the malady is not local—neither, however, is public opinion on such matters local.

## LAW STUDENTS AND ARTICLED CLERKS.

We propose hereafter to devote a portion of our space, and if necessary from time to time to "enlarge our borders," to make space for the discussion of matters of interest to students-at-law and articled clerks. Our columns have, of course, always been open to them, and have been freely used, but possibly they will feel more comfortable if, so to speak, they have a room to themselves. The bashfulness of youth is proverbial, and, speaking from experience, this is a marked feature of those who are to be our future Chief Justices and Chancellors.

It has been for some time a rule strictly enforced, that the examination questions are not to be made public. We have brought before the proper authorities the propriety of changing this rule, and are glad to announce that the Legal Education Committee of the Law Society, with a praiseworthy desire to give all possible facilities to students and articled

## LAW STUDENTS AND ARTICLED CLERKS—THE SUPREME COURT.

clerks in their studies, have acceded to our request to allow us to publish the former questions of the several examiners at the examinations for call, fitness, and fourth year scholarships. We are sure that this will be appreciated by the parties concerned. If properly applied, a consideration of all questions, fairly and clearly propounded, cannot fail to be of much assistance to students in their reading.

We shall be glad to hear from our young friends on any subject of interest to them. In the meantime, we begin our part by publishing, under an appropriate heading, the questions put at the last examination for certificates of fitness. Next month we propose to publish further papers, giving a certain portion at intervals.

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### THE SUPREME COURT.

It was our unpleasant duty last year to allude to the discreditable manner in which the work of reporting the cases in this court has been done. We shall hope shortly to see a marked improvement.

A correspondent in the same number called attention to the long leave of absence granted to a learned judge from Ontario, at a time when it was important in the public interests that he should be in Ottawa. We are glad to notice in the daily papers that he does not, at present at least, intend to avail himself of the leave. There are still some matters in relation to this most important tribunal which seem to us to invite discussion.

Complaints have been freely made that there has been undue delay in giving judgments in cases argued in the Supreme Court. We are not in possession of data sufficiently definite or accurate to enable us to say to what extent these complaints are warranted. But we can speak positively of one case, *The Queen v. Severn*, in which an

important question was raised as to the jurisdiction of the Ontario Legislature to pass an Act to impose a license fee on brewers carrying on a wholesale business, and licensed under the Revenue Acts of the Dominion Parliament,—heard at the last June Sessions of the Supreme Court, and not yet disposed of. The collection of the license fees is delayed, and the business position of an important trade unsettled, in consequence of this delay. It may, in fact, be said that the question in dispute in *The Queen v. Severn* has been standing for judgment since the June Sessions of 1876, when the case of *The Queen v. Taylor* was argued on appeal from the Court of Error and Appeal for Ontario. In the latter case the same question was raised, and the whole case was fully argued. The Court then took the objection that they had no jurisdiction to hear any case in which judgment had been argued previous to the 11th January, 1876, the date of the proclamation calling into exercise the judicial functions of the Court. Both parties to the appeal were anxious to have the principal question settled, but the Court felt themselves debarred from entertaining it, and the appeal was quashed on the objection raised by the Court. Judgment quashing the appeal was delivered in June, 1877, and the case of *The Queen v. Severn* was prepared by consent, and set down and argued the June Sessions, 1877, since which time, as before mentioned, it has been standing for judgment. Many other important cases between private parties were argued at the same Sessions, in none of which, except the *Charlevoix Election case*, has judgment been given.

When it is considered that the Court has the most ample powers of adjournment, and of convening a sessions it is hardly too much to say that the delay which has occurred in delivering judg-

## THE SUPREME COURT.

ment in the cases argued has affected to a great extent the usefulness of the Court, and has been a serious prejudice to suitors and the public. There should be no greater difficulty in disposing of the business than is experienced by the courts of first resort and the Court of Appeal for Ontario. At present, the Court holds but two sessions in the year for the hearing and determining appeals. It is true that the Court may adjourn any session, or may be specially convened, but there is no compulsion about it. This must occasionally cause delays. It certainly would accelerate business if there were four sessions in the year—that is, one in April and one in October in addition to the two now held, in January and June.

It is rather too soon to express an opinion ; but, so far as we can judge, another improvement might be effected by having fixed sittings of the Exchequer Court, at Toronto, Ottawa, Quebec, Halifax and Fredericton, for the trial and hearing of causes, with some provision for the filing of pleadings, etc., with Deputy-Registrars in those cities. This would be a convenience to the profession, and if the business of the Court increases, as it eventually must, something of this nature will certainly be desirable. At present, however, the Court has scarcely enough work to do to keep the rust away. It is generally admitted that a busy man does his work better and more quickly than an idle man. It would be well, therefore, that all revenue cases should be brought in this Court, which is the appropriate forum, and not sent to over-worked Provincial Courts.

There yet remains another matter connected with the administration of justice in the Supreme Court, to which we feel compelled to call attention, and that is the provision of the Act which says that the Judges "shall reside at the City of

Ottawa, or within five miles thereof." This may seem at first blush an unnecessary interference with the "liberty of the subject ;" and it may be urged with some plausibility that it would be as well for judges to reside in the larger cities, the seats of law and learning in the different Provinces from which they have been drawn, and thereby keep up more efficiently their knowledge of the varying laws of these places ; and, moreover, prevent the necessity for those appointed to the Supreme Court of breaking up their homes and emigrating to Ottawa ; a necessity which might, in certain cases, prevent some excellent men from going on that Bench. Whilst there is some force in this argument, we cannot shut our eyes to the fact that centralization is essential to the making of good lawyers and satisfactory judges. Decentralization, such as is the practice in Lower Canada, has worked most injurious results, as all admit. It is, moreover, absolutely necessary in a Court of Appeal, that its judges should have every opportunity of conferring with each other on the various points arising in cases before them in all their details. It is not satisfactory that they should hear the arguments together, and then separate and prepare their judgments without that attrition of mind so necessary to a full elucidation of difficulties. A view might strike one, which, if communicated to his brethren, might clear up a doubt, which would otherwise result in a dissenting opinion, or possibly a majority opinion might result the other way if the different views of the judges were communicated to each other, and carefully argued between them. What is wanted in a Court of final resort is not a series of long judgments from each member of the Court, each having gone off on his own tack, leaving it to the reader to find out as best he may the points wherein they agree,

## THE SUPREME COURT—THE REVISED STATUTES OF ONTARIO.

thereby to ascertain what the law is ; but a well-considered, fully-discussed judgment, stating clearly, with sufficient reasons, what the opinion of the Court as a whole is upon the point of law submitted. For these and other reasons, we conceive there was much wisdom in making the enactment alluded to. There is a rule, however, that law-makers should not be law breakers ; and in the same way a judge ought not wilfully to bring himself into judgment. It so happens that Mr. Justice Taschereau resides not "in Ottawa, or within five miles thereof," but in the City of Quebec. During the two-and-a-half years' existence of the Court he has failed to comply with the law ; and, so far as the public know, no notice has been taken of this fact by the Government. We understand that the learned judge only comes to Ottawa to attend the sessions, and leaves immediately after. We know of no reason why he should not comply with the law, as do the other judges. It may be inconvenient for him, but he knew the law when he accepted office.

It is of the most vital importance that there should not be even a shadow of complaint as to the mode of conducting business in the Supreme Court of the Dominion, or as to the conduct of any person holding the most responsible office of a judge thereof. We, therefore, make no apology for drawing attention to the matters alluded to in the foregoing remarks.

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THE REVISED STATUTES OF  
ONTARIO.

If the times have any faithful signs, one of the most legible is the nearness of a radical reform in the English judicial system. That the substitute for a system, which the Poet Laureate has branded as

"——the lawless science of our law  
That endless myriad of precedent,  
That wilderness of single instances,"

still withstands the attacks made upon it, is due to the very ungainliness of its dimensions, which prevents a blow from reaching a vital part. Some of its most cherished principles have been pronounced to be anachronisms and puerilities. Unwieldy, chaotic, incoherent, are some of the mildest epithets which have been bestowed upon the form in which it is enclosed ; and the latest reforms in England seem only to have brought to light the further iniquity of defectiveness in administration. Some have held the opinion that the evil has been allowed to go so far that a remedy is hopeless, and should not be attempted. The progress of late years, however, in the Revised Edition of the Statutes, seems to have raised the hopes of jurists with regard to the possibility of a consolidation of the Statute law. The advance, though something has been gained, is as yet scarcely more than from chaos without an index to chaos with one. The Revised Edition is not even a Digest with the Statutes on each subject in juxtaposition, but it is merely a reprint of the Statutes which are in force, in chronological order.

In Ontario, we are somewhat better off. Our Common Law is founded on that of England, and is therefore open to the same reproaches. Mr. Mowat's Administration of Justice Acts have worked many much needed reforms, and our Statute law has not been allowed to accumulate for much more than twenty years without some sort of Revision.

The Revised Statutes of Ontario, which came into force on the 31st of December last, are the latest instance of a legislative retrospect before taking a fresh start. We cannot welcome them too warmly. Our statutes have indeed

## THE REVISED STATUTES OF ONTARIO.

been a tattered and shabby garb of shred and patches, and few beyond the profession, have any idea of the difficulties attending the collection of the law upon any particular part from a series of statutes ranging over even twenty years, under our system of piecemeal legislation. Each year there are added to the already too-loaded shelves of the lawyer, a volume from the Legislature of Ontario, and another from the Dominion Parliament, each containing in juxtaposition, seldom the result of any systematic arrangement, enactments upon every conceivable subject, not more than a quarter of which have any extensive or permanent application to the community at large. The few which are of that character are by spasmodic legislative efforts mutilated by repealing clauses, or, by way of amendment, receive excrescences, which in their turn are subjected to like treatment, until what actually remains in force cannot be ascertained with any degree of certainty, even by the trained professional man, and has to be worked out at the expense of the first unlucky suitor whose case comes before the Courts.

The benefits are therefore obvious of a publication which collects the scraps and fragments of living law scattered through a long series of volumes, divests them of all repetitions and superfluous verbiage, expresses them in simple and popular phraseology, and arranges them in logical order as a consistent whole. This is what has been attempted, and we think with great success, in the Revised Statutes.

The task of the consolidator is not an easy one. It is not to recast the law into what he conceives it ought to be; but to weave into what will express the law as it is materials which are often unequal and inharmonious, and which, nevertheless, he must alter as little as possible. To combine into one Act en-

actments of different dates, and the work of different minds, without assimilating their language, would result in confusion, which, besides its inelegance, might be productive of uncertainty as to the meaning of the enactment, since difference of language in the same Act should indicate a difference of meaning. In re-casting, however, where consolidation cannot be otherwise properly effected, the greatest care should be taken that the true spirit of the enactment is reproduced. A believer in the capacity of an Ontario Legislature might add, that this is especially so where, as has been the case with the Revised Statutes, the consolidation is not afterwards subjected, clause by clause, to the scrutiny of the House of Assembly; but for our part, we should much prefer to have the statutes direct from the Commissioners.

We have had the privilege of seeing the advance sheets of their work, and so far as we can judge from the glance we have been able to bestow upon them, we believe they will stand the test we have mentioned. Entire remodelling of clauses does not seem to be of very frequent occurrence, and where it has been deemed necessary, has been done with marked advantage, and with a care and precision which seems to leave nothing to be desired. One section we may cite in a recent Act (36 Vict., cap. 26, sec. 1), which we have long regarded as a marvel of involution, and which is scarcely recognisable in its new dress (Rev. Stat. c. 134). Throughout, we observe, that a rule contained in the Interpretation Act, viz: that the law is to be considered as always speaking, has been observed in the Revised Acts, which are expressed in the present tense, whether present or passing events, or past or future contingencies are being referred to. This change was introduced into the Consolidation of 1859, except in regard

## THE REVISED STATUTES OF ONTARIO.

to the Acts relating to Real Property. In those Acts little innovation in any respect was attempted, and amongst other things left unaltered was the promiscuous use of the auxiliary "shall." Its appropriate use to express an authoritative command, is familiar to us in the "Thou shalt not" of the Mosaic decalogue. The Consolidators of 1877 have, and rightly as we think, extended this change of language to the Real Property Acts.

As directed by an Act of last Session, the legislation of that year has been incorporated in the Revision, so that the preceding eighteen years of statute law contained in twenty-one volumes, have become a dead letter so far as regards the public general statutes with which the Provincial Legislature has any power to deal. That little or no reference will require to be made to the old statutes, will be seen from a glance at the very useful Appendix C to the Revised Statutes. In that table is given a list of the Acts and parts of Acts not consolidated, and the greater number of those have not been consolidated by reason of their relating to matters which are clearly within the cognizance of the Dominion Parliament, or in respect to which the power of legislation is doubtful or has been doubted. Isolated sections, forming part of the criminal law and having no very extensive operation, form the major part of the clauses enumerated in this list; but there are a few provisions such as those of C. S. C., cap. 57; and C. S. U. C., cap. 42, relating to bills of exchange and promissory notes, which might have been usefully printed in full, as a supplement to the Revised Statutes; indeed, a third volume which would include the whole of the enactments mentioned in Appendix C, would not be a very costly addition to the Revision, when compared with its value as a compendious substitute for the

twenty-one volumes, scattered through which, the enactments there referred to, are at present only to be found.

In the arrangement of the Revised Statutes, the grooves in which legislation has run, and sub-divisions already tolerably familiar to those who have most to refer to the statutes, seem to have been more considered than the production of a strictly scientific system of classification, which would address itself only to the jurist. For example, legislation in Ontario in regard to trustees and executors, has been, as a general rule, made more or less in connection with the subject of wills; consequently, the Acts relating to wills, and to trustees and executors, have been placed side by side, and under Title VII, relating to the law of property; although a jurist would probably have placed the chapter respecting trustees and executors under Title X, relating to the laws affecting special classes of persons. So also under Municipal matters, Title XII, will be found a great variety of subjects, some of which, might perhaps more appropriately be classed under other heads.

The plan adopted, was, we think, the wise one. A consolidation of statutes must necessarily, from the nature of the Statute Law, contain only a fragment of the general law, and is not susceptible of a scientific arrangement which would place under each head the whole of the subjects scientifically appropriate there, without repeating any part of them under any other head.

Such a self-consistent and harmonious unity can only be expected from a Code which embraces the whole law on the particular subject treated of. That arrangement of the Revised Statutes which would suit the ordinary intelligent reader quite as well as the legislator or professional lawyer, was therefore obviously the best.

## THE REVISED STATUTES OF ONTARIO—DISTRESS CLAUSES IN MORTGAGES.

To say that the work has been well done, is to say that no more has been done than was to be expected from the persons to whom the work was entrusted; but the necessarily numerous judicial duties of some of the members of the Commission, must have often prevented their giving that continuous attention to the work which it demanded. The assistance, however, given by them, and in particular by Mr. Justice Patterson, Vice-Chancellor Blake, and Mr. Justice Strong, before his removal to Ottawa, has, we believe, been very considerable; nor in this connection do we desire to overlook the services of the other Commissioners, whose names have already been given.

The first consolidation after the formation of the Dominion, and the distribution of the legislative power by the British North America Act, 1867, would necessarily be attended with the gravest difficulties, and in view of this fact, and looking at the dimensions of the volumes before us, we think it extremely creditable to those engaged in the work, that it has been completed as soon as it has. In spite of his multifarious public duties as Attorney-General, Mr. Mowat has, we have good reason to state, found time to give an immense amount of personal attention and supervision to the work, as well in matters of detail as in general questions, and in every way facilitated the labours of those engaged in the preparation of the volume. His Honour Judge Gowan, with his usual energy and unflagging application, has also given much time to the work. His experience on the preparation of the Consolidated Statutes, and in the Consolidation of the Criminal Law, to say nothing of his ability and aptitude in the preparation of Acts of Parliament, was, we are told, of the greatest benefit. But whilst giving due credit to those who thus gratuitously

lent their aid, it is scarcely necessary to say that if the right man had not been found to take charge of the whole, and devote himself exclusively to the work in all its details, their assistance would have been of little practical use. We are satisfied that the right man was found in Mr. Thomas Langton, Barrister-at-Law, and we have much pleasure in stating what we know to be the opinion of at least several of the Commissioners, and we understand to be the opinion of all, that his services were invaluable. The volume is accompanied by a reasonably full and apparently well arranged index, the work, we believe, of Mr. R. E. Kingsford, Barrister-at-Law. We regret that it was not thought proper to bind the volumes more substantially. The present binding is so slight as to be almost useless for books of such constant reference.

## DISTRESS CLAUSES IN MORTGAGES.

BY ALEX. LEITH, Q.C.

As the only one now at the Bar, of the counsel in the case of *Royal Canadian Bank v. Kelly*, I am frequently asked as to the grounds on which it was decided, the judgment in appeal having been lost. It has, therefore, occurred to me to give my recollection of them in the pages of the LAW JOURNAL and to refer briefly to the case as reported in 19 C. P. 196, 430 and 20 C. P. 519; and in appeal, 22 C. P. 279.

The case was one of replevin. The first and material avowry as set forth in 19 C. P. 196, is as follows:—

"That before the said time when, &c., one Dewey mortgaged to defendant Kelly certain lands, the mortgage containing a proviso for making the same void on payment of the amount secured by a day named, and covenant for payment, and also covenant for distress on default in payment in accordance with the

## DISTRESS CLAUSES IN MORTGAGES.

terms of clause 15, of schedule 2, 27 & 28 Vic. ch. 31, with an averment that there were due \$1,412.50 for interest, and that default had been made, and thereupon defendant Kelly distrained."

The avowry as above given does not set it forth fully as pleaded. Other important facts can be collected from the judgment, viz. : that in the covenant for payment, no day was named for payment of interest, except the one day named for payment of principal; that the distress was after default in the covenant, and was only for interest accrued due up to the day for payment of the principal. It is said to have been admitted on argument that the mortgage was drawn under the Act as to short forms of mortgages.

Clause 15, referred to in the avowry, is, "provided that the mortgagee may distrain for arrears of interest," which, under the corresponding lengthy form, amounts to this, viz. : that the mortgagee may distrain on the lands, and by distress warrant recover by way of rent reserved, as in case of a demise of the land, interest in arrear with cost of distress, as in like cases of distress for rent.

The avowry was demurred to on the ground, among others, that the distress clause did not authorize the taking goods of a stranger on the premises, but was a mere license to take the mortgagor's own goods.

Judgment was given for the demurrer; the learned judge who gave judgment, saying:—

"Upon the whole I have come to the conclusion that a clause in a mortgage that the mortgagor shall continue in possession, coupled with his occupation in pursuance of such clause, and coupled also with a covenant for distress, in the terms contained in this instrument, does create the relation of landlord and tenant at a fixed rent; that by the indenture of mortgage in this case, the tenancy created was until the day of re-payment of the principal

for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises. I am, however, of opinion that the demurrers to these avowries must prevail; for in neither of these avowries is it alleged that the mortgage contained a provision that the mortgagor should be permitted to continue in possession of the mortgaged premises, nor that he did occupy in pursuance of such permission at the time of the distress, or at any time, which are matters as it appears to me necessary to be averred."

It will be observed that so much of the above language as relates to the creation of any tenancy between the parties is extra-judicial, for the judgment proceeded on the sole ground that the avowry showed no right in the mortgagor to continue in possession, nor that in fact he did so continue. The whole matter seems to have been gone into from the mortgage having been admitted in argument "to contain a clause providing for the mortgagor continuing in possession." So much of the judgment as referred to the creation of a *tenancy at will at an annual rent* after the day named for payment, was, as will be seen hereafter, over-ruled by the decision in Appeal.

The case came up again on an amended avowry in 19 C. P. 430.

The avowry, as reported, showed a mortgage to the defendant under the short form Act, with proviso for redemption of the land on payment of principal and interest on or before 1st February, 1867, with the distress clause, No. 15, as above, and the clause, No. 17, allowing mortgagor possession until default. It alleged that the mortgagor under that clause 17, entered and occupied at and after the taking the goods, and paid no interest; that defendant permitted the mortgagor so to occupy as his tenant; and that at the time of taking, and while mortgagor occupied, a large sum for



## DISTRESS CLAUSES IN MORTGAGES.

interest fell due, whereupon defendant avowed. These further facts appear to have been alleged in the avowry as gathered from the judgment and from the case on the same avowry in subsequent reports, viz: that the distress was for two years' interest, ensuing the date of the mortgage, which was the 23rd February, 1867. The distress was made therefore more than six months after 1st February, 1867, the day named for payment of both principal and interest, in payment of which default was made.

The avowry was demurred to; the grounds of demurrer were, among others, that the only tenancy created by the mortgage was up to 1st February, 1867, the day named for payment; that such tenancy was not at a rent; that even if it were, the distress for such rent could not be made more than six months after the end of the tenancy; that no further tenancy existed between the parties, or, if so, yet at no rent agreed on.

The judgment of the Court was based on the views expressed in the former report, and it was said:

"The occupation of the mortgagor under the terms and conditions of this mortgage, constituted, in my opinion, the relation of landlord and tenant between the mortgagor and mortgagee at a fixed rent, such rent being the interest named in the mortgage as the interest accruing on the principal sum received. That such was the intention of the parties appears to me to be the true construction to put upon the instrument as pleaded in the avowry. So long, then, as occupation continued in accordance with the will of the mortgagee, he has, in my opinion, the right to distrain for the interest secured by the mortgage, *by way of rent reserved*, and incident to that right is the right of distraining upon the property of third persons on the lands comprised in the mortgage. Assuming the tenancy created by the mortgage to have been for a determinate time until the day named for payment of principal and interest, the continuance of the occupation of the mortgagor, by the permission of the mortgagee, constituted the mortgagor a tenant

thereafter, at the will of the mortgagee, and such tenancy must be held to be on the terms of distress contained in the mortgage."

The case came up next in 20 C. P. 519. The avowry was in this case as last referred to, but instead of a demurrer there was a plea that the mortgagor did not hold or continue to hold as tenant to the mortgagee, the avowant. It appeared that the mortgagee never executed the mortgage. At the trial the issue was found for the avowant on a ruling conformably to the view of the law, taken in the last reported case. This ruling was moved against and upheld on the authority of the former decision; it was also held that evidence of payment was not admissible upon that plea.

Finally the case came up in Appeal (22 C. P. 279) from this last decision in 20 C. P. 519.

The grounds of appeal, among others, were, that at the time of distress there was no tenancy at any rent; that there was no such tenancy created by the mortgage; that the tenancy, if any, created by the mortgage, had expired more than six months before the distress.

It must be borne in mind that the landlord (mortgagee) could not distrain under the Act of 8 Anne, cap. 14, but within six months after the end of the tenancy and during the possession of the tenant. The facts showed possession by the tenant. The judgment appealed from insisted on two tenancies; one created by the possessory clause till 1st January, 1867, when the principal and interest fell due, the other by the remaining thereafter in possession till the distress, as a tenancy at will; also that each tenancy was at a rent reserved as rent service equivalent to the interest. It must not be lost sight of either, that if there was *any* rent due for which the

## DISTRESS CLAUSES IN MORTGAGES.

mortgagor could have distrained, then he could have well avowed.

The following points arose on argument:

1st. Taking it to be clear, as indeed it was, that if the mortgagee had executed the mortgage, there would have been a good valid re-demise to the mortgagor till 1st January, 1867; what was the effect of his non-execution? It was deemed of importance by the appellants to make out that there was a tenancy created to 1st January, 1867, and not a tenancy at will at the outstart; for if it were a tenancy at will, then probably it would be held to continue such down to the time of distress; whereas, if held to be a tenancy for a term till 1st January, it left it open to the appellants to contend (as the Court afterwards held) that after 1st January, the mortgagor was an overholding tenant, and so not liable to any rent.

I read the judgment of the Court, given by Draper, C. J., and it distinctly recognised a tenancy created by the mortgage up to 1st January (indeed the judgments in the Court below recognised this); but I do not remember whether this was on the ground that the acceptance of the mortgage by the mortgagee might be regarded as evidence of valid demise by parol, or whether on the ground that, as contended in argument, the term was well executed in the mortgage under the Statute of Uses. If the latter, the mortgage would have operated as a conveyance to the mortgagee to the use of the mortgagor, till default, with a shifting use to the mortgagee after default.

2nd. Whether admitting a tenancy till 1st January, 1867, such tenancy was as a matter of *construction* of the mortgage *at a rent*; and whether the distress clause was not a mere collateral agreement licensing only seizure of goods of

the licensor. 3rd. Admitting that, as a matter of construction, there was an intention to create a tenancy at a rent, whether the *reservation* of the rent was not bad, the covenant to pay interest being to pay, not to the heirs, but the executors, who were strangers to the reversion? The appellants on this insisted that such a covenant did not run with the land, but was a collateral covenant to pay a sum in gross; and that as the right under the distress clause did not arise except on non-performance of the covenant, the reservation was bad as being uncertain, conditional, and dependent on non-performance of a collateral matter to be performed in favour of strangers to the reversion.

As to the two last points I am unable to remember the judgment. The first of them is of great importance. The Court may or may not have decided these points; it was not necessary for them to do so, as they held, as I remember, that no rent became due after 1st January, and therefore the distress was invalid as being more than six months after that date, even supposing a rent were well reserved up to that date.

As a matter of opinion I should say as to those two questions, with great deference, that on the *construction* of the instrument there was no demise *at a rent*, i.e., no rent reserved as rent service.

4th. Was there any tenancy at will after the 1st January, there being no evidence of assent or dissent by the mortgagee to continuance of possession? As to this I have a distinct recollection that it was held (Gwynne, J. diss.) that the mortgagor was a mere overholding tenant, and not tenant at will, and so not liable to any rent. Consequently, for the reason above stated, the distress was not warranted.

## DISTRESS CLAUSES IN MORTGAGES.

5th. If the mortgagor had been held to be tenant at will after January, or there had been evidence to show such a tenancy, would it have been at a rent equivalent to rate of interest, made payable before 1st January? The appellants contended that as, after 1st January, interest was not made payable at all, it could not be claimed as of right at any *certain* rate, but only to be given as damages, and therefore not well reserved as a rent certain. This point was not raised in the cases in the Court below, and on this alone, Gwynne, J. agreed to reverse the judgment. The other learned Judges on this point also held that no rent was payable.

The best mode of creating the position of landlord and tenant, giving a right to distrain on any goods (not exempt) on the premises for arrears of interest, would be by what is termed an Attornment clause. I subjoin such a clause, which may answer the purpose. The conveyancer, who desires to create any such position, will need exercise some little care. If a tenancy be created for a term certain, as, till the day named for payment of principal, and the default is then made, and the tenant continues in possession, then, by such mere fact, he, as decided in the above case, is a mere overholding tenant, and so not liable to any rent. To make him so liable there must be some evidence of a new tenancy at a rent.

It is, therefore, perhaps more to the interest of the mortgagee to constitute the mortgagor his tenant, either at will, or from year to year; the latter tenancy is to be preferred, as the former is defeasible by the death or alienation of either party with notice to the other, and consequently the rent is precarious. If a tenancy from year to year, or for a fixed term, as to the day for payment of principal, be created, care must be taken

to introduce a clause enabling the mortgagor at any time after default to determine the tenancy, as otherwise, unless intent to the contrary were apparent on the mortgage, the ordinary right given to the mortgagee to enter might be over-ridden, and the mortgagor might, notwithstanding default by him, be entitled to the usual half-year's notice to quit, incident to a tenancy from year to year, before the tenancy could be determined; or, if the tenancy were for a fixed term, then to possession to the end of the term. If an Attornment clause, as above, creating a tenancy, be introduced, it will be unnecessary, perhaps, indeed improper, to insert the usual clause authorizing the mortgagor to retain possession till default.

In the above case there was but one day fixed for payment of principal and interest, and the possessory clause gave right to possession till default in payment. There was, therefore, no uncertainty as to the *terminus* or duration of the redemise, from which it could be contended that it was void. If the possessory clause had been, as is sometimes the case, that the mortgagor might retain possession till default *and* notice demanding payment, or other notice, then it would seem such clause would be void as a lease for a term, for the uncertainty as to when the notice might be given. It would seem also that where, as is usual, a mortgage appoints a day for payment of principal, and earlier days for payment of interest, with a proviso for possession to the mortgagor till default, there is no uncertainty as to the limit of the term to prevent its taking effect. The day named for payment of the principal is the *terminus* or limit beyond which it does not last as a term, though it may end sooner by non-payment of interest. This latter possibility, however, creates no uncertainty

C. of A.]

DISTRESS CLAUSES IN MORTGAGES—NOTES OF CASES.

[C. of A.]

as to the extreme terminus to vitiate the demise, as may be exemplified by the case of a demise to A for ninety-nine years, if he so long live, which is a valid demise.

The following is suggested (subject to remarks above made as to it) as an appropriate clause to create the position of landlord and tenant at a rent as rent service:—

“And the mortgagee leases to the mortgagor said lands until the said day of one thousand eight hundred and (or from year to year) undisturbed by the mortgagee or anyone claiming through or under him, he, the mortgagor, his executors, administrators or assigns, paying therefor in every year during the said term, on each and every of, and on the same days, as in the above proviso for redemption appointed for payment of interest, such rent or sum as equals in amount the amount of interest payable on such days respectively, according to said proviso, without any deduction.

And it is agreed that such payments, when made as aforesaid, shall respectively be taken and be in all respects in satisfaction and payment of the said interest then payable; provided always, and it is agreed, that in case any one or more of the covenants or agreements herein of the mortgagor be untrue or be unobserved or broken at any time, the mortgagee, his heirs or assigns, may enter on the said lands or any part thereof, in the name of the whole, without any prior demand or notice, and take and retain possession thereof, and determine the said lease.”

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

From C. C., Lincoln.]

[Sept. 27.]

IN RE HARPER WILSON, AN INSOLVENT.

*Insolvent Act 1875, sec. 84—Double proof.*

H. W. carried on business separately, and as a member of the firm of W. & S. The joint

and several notes of W. & S. and H. W. were given to secure debts due by the firm—and shortly afterwards both W. S. and H. W. made assignments in insolvency,

*Held* (Moss, J. A.), reversing the decision of the County Court, that under section 84 of the Insolvent Act of 1875, the holder of these notes was entitled to prove against the partnership estate for his claim, less the amount at which he valued the separate liability of H. W., and the partnership creditors not having assumed this liability, against the estate of H. W. for the full amount of the debt.

The rule against double proof in such cases was impliedly repealed by the 60th sec. of the Insolvent Act of 1869, which contained the same provisions as the 84th section of the Insolvent Act of 1875.

*Re Dodge v. Budd*, 8 C. L. J. N. S., 50, commented on, and disapproved of.

*Appeal allowed*

From Q. B.]

[Dec. 17.]

O'CONNOR v. DUNN.

*Evidence—Field Notes of deceased Surveyor—Admissibility of.*

In order to prove the boundary between lots 3 and 4, notes of a survey made by a deceased surveyor, and entered in a book in which he kept a diary of matters private and professional, were tendered in evidence. The first entry which it was desired to read was as follows:—“6th June, 1877. Got Mr. A. to show me the stake between Nos. 2 and 4,” &c. In another part of the book the following entry appeared:

D. Boulton, Esq., £2 16 3  
At D. Boulton's 4

3 0 3 pd.

There was no evidence that at or about the time of the first entry Boulton had any interest in either lot 3 or 4, but it was sought to connect the two entries by proving that Boulton acquired title to lot 2 on the 23rd August, 1827, and to lot 3 on the 28th January. Surveyors were not under any obligation at that time to make notes of surveys, and it was not proved that the entry was made contemporaneously with the transaction.

*Held*, (Hagarty, C. J. C. P. Moss, C. J. A.

C. of A.]

NOTES OF CASES.

[C. of A.]

Burton, J. A., and Blake, V.C.), reversing the judgment of the Queen's Bench that the entry was not admissible as one made in the course of business, or in the performance of a quasi-public duty.

*Held*, also, that extrinsic evidence could not be given to connect the two entries, and that even if the second entry were admissible as an entry against interest, it did not make the note of the survey evidence, as it was not referred to in it, or necessary to explain it.

*M. C. Cameron, Q.C. (J. H. Ferguson with him)*, for the appellants.

*McCarthy, Q.C.*, for the respondent.

*Appeal allowed.*

From Chy.]

[Dec. 17.]

YATES V. GREAT WESTERN RAILWAY COMPANY.

*Patent of Invention—Combination.*

The bill was filed to restrain the infringement of a patent. The invention was described as an "improved chair for preventing bolts or nuts used in bracing or joining together iron rails from becoming loose or insecure." The specifications stated that this was accomplished by introducing the iron chair between the iron rails and the sleeper at the joints of the rails, and that the chair was constructed with a raised edge or lip extending over a part or the whole length of its surface, and that this lip was formed and made of a suitable shape and depth so as to be in constant contact with the heads or nuts of the bolts after they were placed in position and firmly screwed to the straps (fish-plates) and rails. It also stated, "It will be seen that the upper portion of the chair . . . forms a seat or check for receiving the sides of the nuts or heads of the bolts, and which will entirely prevent the bolts from working loose or dropping out of their places from the vibration of vehicles passing over rails or from other causes. The patentee claimed as his invention "the lipped chair in combination with the heads or nuts of bolts . . . for retaining and preventing the nuts from becoming loose." It was proved that the lipped chair, the fish-plate, and the bolt had all been used in combination before the issue of the patent; and although not so used for the purposes of the patent, still that result was attained when the nuts happened to be of a large size and came in contact with the lip.

*Held*, (Moss, C.J.A., Burton, J.A., and Blake, V.C.,—Patterson, J.A., dissenting) re-

versing the judgment of Spragge, C., that no matter how useful the contrivance might be, it could not be the subject of a patent, as it was wanting in the element of invention.

*Bethune, Q.C.*, for the appellants.

*Boyd, Q.C.*, and *Macmahon, Q.C.*, for the respondent.

*Appeal allowed.*

From Chy.]

[Dec. 17.]

BILLINGTON V. THE PROVINCIAL INSURANCE COMPANY.

*Fire Insurance—Non-disclosure of existing Insurances—Notice to Agent.*

The plaintiff applied to the defendants through one Suter, their local agent at Dundas, to effect an insurance on certain machinery for two months from the 6th of February, 1875. He signed the defendants' usual form of application, which contained an express agreement that it should form a part of the policy. In answer to the inquiry therein respecting other insurances, two existing policies were mentioned; but a third, which was in the Gore Mutual, was omitted, owing to the policy having been mislaid, and the plaintiff not remembering how much of it was on the machinery, and how much on the building in which the machinery was contained. The plaintiff was busy at the time, and wished Suter to wait until he could find it, as he was most anxious to have the amount inserted, but in order to facilitate the matter, Suter, through whom this policy had been effected as agent for the Gore, promised to ascertain the correct amount from a memorandum in his office, and fill it in before forwarding the application, or retain the application until he saw the plaintiff again. The application was, however, sent to the head office by Suter, without the omitted particulars, and was accepted by the board. No person connected with the Company had any knowledge of the insurance in the Gore Mutual except Suter. Suter's authority extended to renewing premiums and issuing interim receipts for policies. When the application was signed Suter gave the plaintiff an interim receipt for the premium, which stated, "that any existing]assurances must be notified in writing at the issuing of this receipt, or this [contract is void," and provided also that the policy should be subject

to the approval of the Directors, to whom power was reserved to cancel the risk within 30 days from the date of the receipt. In accordance with the practice of the defendants, where the risk only extended over a short period, instead of a formal policy, they issued a certificate which stated that the person was insured subject to all conditions of the defendants' policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy if required. The fire occurred after the 30 days, but within the two months. A policy was therefore issued, endorsed with their ordinary conditions, one of which was that notices of all previous insurances should be given to the defendants and endorsed on the policy, or otherwise acknowledged by them in writing at or before the time of making assurance thereon, or otherwise the policy should be of no effect. The Gore District assurance was not endorsed on the policy.

*Held* (Moss, C. J. A., Burton, J. A., and Blake, V. C.—Patterson, J. A., dissenting), reversing the judgment of Proudfoot, V. C., that the verbal notice to the agent was inoperative to bind the Company, and that the plaintiff was not entitled to recover.

*B. B. Osler, Q. C.*, for the appellant.

*Boyd, Q. C.*, and *C. Moss*, for the respondents.

*Appeal allowed.*

From Chy.]

STAVELY v. PERRY.

*Accretions to Land—Highway.*

By 10 Geo. IV., c. 2, the Cobourg Harbour Company were authorized "to construct a harbour at Cobourg, and also to erect all such needful moles, piers, wharves, buildings, and erections whatsoever, as should be useful and proper for the protection of the harbour and for the accommodation and convenience of vessels entering, lying, loading, and unloading within the same; and to alter and repair, amend and enlarge the same, as might be expedient," &c.

The plaintiff was the owner of a lot which extended to the water's edge of Lake Ontario, and fronted on a public highway called Division Street. Under the authority of the above Act the Company built a pier in front of Division Street. From time to time, earth dredged from the basin was deposited to the east of the wharf, and crib-work was placed on the outside to prevent it being washed away. On the additional land thus formed

partly by accretion and partly by the action of those representing the harbour, the defendants built a storehouse and fence along the front of that part of the plaintiff's land which had accrued to him from alluvial deposits, and the plaintiffs filed a bill to compel the defendants, in whom the powers conferred on the Harbour Company had been vested, to remove the storehouse and fence, on the ground that this erection was on the highway, and that they prevented him from having access thereto from his land.

*Held* (Moss C. J. A., Burton, Patterson, J. J. A., and Blake, V. C.), reversing the decision of Proudfoot, V. C., that the formation in question was not part of the highway, but an artificial structure constructed for the harbour purposes under the authority of the Act, and that the plaintiff was not entitled to relief.

*Held*, also, that gradual accretions in front of a road allowance form part of the road allowance, just as similar deposits in front of a lot accrue to the benefit of the owner of the adjacent land.

*Robinson, Q. C.*, and *Boyd, Q. C.*, for the appellants.

*Armour, Q. C.*, for the respondent.

*Appeal allowed.*

From C. C. York.]

[Dec. 17.

BLACKBURN v. LAWSON.

*Insolvency—Use and Occupation—Action f.r.*

This was an action for the use and occupation of a store belonging to the plaintiff from the 1st April to the 1st July, 1875. On the 20th April the defendant made an assignment under the Insolvent Act of 1869. The assignee did not occupy the shop further than was necessary to remove the goods to another store which the defendant owned. On the 1st of May a deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon the due execution and confirmation thereof. The deed was confirmed on the 14th June, when the defendant was allowed to continue on his own account the business which since his assignment he had nominally conducted on account of the assignee, but no written reconveyance was ever made. It was proved that the assignee had given the defendant the key of the store as soon as the deed was executed: that people who wanted to see the store applied to him and were shown over it by his son: that the landlord's agent had recognised the

## C. of A.]

## NOTES OF CASES.

## [Q. B.]

defendant as having the premises, by sending people who inquired about the place to the defendant as the person who had it to dispose of: that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in consequence of the deed of confirmation and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on the 1st of July, 1876.

*Held* (Moss, C.J.A., Burton and Patterson, J. J.A., and Galt, J.), reversing the judgment of the County Court that an action for use and occupation would lie against the defendant for the quarter's rent.

*Seemle*, that the transfer was sufficient to reconvey the property.

*H. J. Scott*, for the appellant.

*McMichael*, Q.C., for the respondent.

*Appeal allowed.*

### QUEEN'S BENCH.

#### IN BANCO.—MICHAELMAS TERM.

DECEMBER 28, 1877.

#### REGINA V. WILKINSON.

*Criminal Information—New Trial, adding new ground not taken at the trial or in rule nisi.*

After a trial of a criminal information for libel, in which defendant was found guilty, defendant obtained a rule *nisi* for a new trial for misdirection and rejection of evidence. Upon the argument, defendant's counsel wished to argue a ground of misdirection not taken at the trial or mentioned in the rule *nisi*. The court, after hearing counsel, allowed this ground to be argued as of favour and not as an amendment of the rule.

*Bethune*, Q.C., for the Crown.

*McCarthy*, Q.C., for defendant.

#### REGINA V. LAKE.

*Certiorari—Identifying Magistrates.*

On an application for a writ of *certiorari* to remove a conviction into this court, the affidavit of service on the magistrates did not identify the persons served as the justices who had made the conviction, further than that the persons served had the same names as the justices, and were described as "two of Her Majesty's Justices of, &c."

*J. G. Scott*, Q.C., for the Crown.

*Ferguson*, Q.C., for defendant.

#### Re REVELL v. THE COUNTY OF OXFORD.

*County Assessment—Basis of.*

The Assessment Act, 32 Vict., ch. 36, sec. 77, declares that the County, in apportioning a county rate among the different townships, &c., within the county, shall, in order that the same may be assessed equally on the whole ratable property of the county, make the amount of property returned on the assessment rolls of such townships, &c., or reported by the valuers as finally revised and equalized for the preceding year, the basis upon which the apportionment is made.

Where a County made an apportionment for 1877 upon the basis of the rolls for that year instead of those of 1876, *held*, that by-laws passed upon such equalization were illegal.

*Held*, also, that it is now proper to quash an illegal by-law.

*Bethune*, Q. C., for applicant.

*Ball*, Q. C., contra.

#### BENSON V. OTTAWA AGRICULTURAL INS. CO.

*Fire Insurance—Agency—Concealment.*

*Held*, that the non payment of a premium note had been waived by a defendants' writing the plaintiff's assignee (C. S., the insured) not to pay the premium note which had been mislaid.

The policy provided that "if any misrepresentation or concealment of facts has been made in the application, or if the applicant has mis-stated his interest in the property, or if he shall in any manner make any attempt to defraud this Company, the policy shall be void."

The third plea averred that in the said application for insurance, C. S., (the insured,) concealed from the defendants that the premises were situate near and opposite to a blacksmith's shop, which was alleged to be a material fact.

The evidence shewed that defendants' agent measured the distance of the surrounding buildings, and instructed C. S.'s agent that it was not necessary to enter the blacksmith's shop. It was also provided that the Company's agent should be considered the agent of the insured for the purpose of filling up the application.

*Held* (Wilson, J., diss.), that the plaintiff was entitled to recover: that the omission of the blacksmith's shop was immaterial, and that there was no concealment.

*Robinson*, Q.C., for plaintiff.

*J. K. Kerr*, Q.C., contra.

**Re MAJOR V. COUNTY OF FRONTENAC.**

*Temperance Act of 1864—Insufficient notice of polling.*

*Held*, that the requirements of sec. 37 of the Temperance Act of 1864 as to giving notice of intended polling under this Act are imperative. Where, therefore, in several townships in a county the notices had been posted up too short a time, and in other townships the posting had been irregular, and where it was clear that but for these irregularities the result of the voting might have been different.

*Held*, that the by-law was invalid, and must be quashed.

*Bethune, Q.C.*, for the applicant.

*J. K. Kerr, Q.C.*, contra.

**REGINA V. SUTTON.**

*Conviction—37 Vict. ch. 32, sec. 25—Joint Penalty.*

A police magistrate having (1) convicted two persons jointly for an offence under 37 Vict. ch. 32, sec. 25, and (2) imposed a joint penalty upon them. *Held*, that the conviction was void for both reasons. *Held*, not a proper case for amendment.

*J. G. Scott, Q.C.*, for the Crown.

*Oster*, for the defendant.

**TYLER V. HINTON.**

*Covenant—Mortgage—Payment of instalment—Staying proceedings.*

Where in an action on a covenant in a mortgage, the defendant paid into Court the instalment then due, and interest and costs, and applied to stay proceedings, relying on Consol. Order 46 of the Court of Chancery, and under the general jurisdiction of that Court to relieve against a penalty,

*Held* (Wilson, J., dissenting), that Order 461 applied. Per Wilson, J., that the order applied only to foreclosure suits, and not to other actions in respect of the mortgage.

*S. Richards, Q.C.*, for plaintiff.

*Beaty, Q.C.*, for defendant.

**STRIKHOF V. ROYAL CANADIAN INS. CO.**

*Marine Ins. Co.—“Barge,”—Average.*

The policy was on the ship or steam-barge W. S. Ireland. It contained the following words: “This policy warranted by the assured to be free from any contribution for loss by jettison of property laden on deck of any sail vessel or barge.”

*Held*, that the vessel in question was not a barge within the meaning of the policy.

Deck loads on such vessels are subject of a general average.

General average discussed.

*Atkinson*, for plaintiff.

*Robinson, Q.C.*, contra.

**HAGARTY V. SQUIER.**

*Bills and Notes—Maker of note.*

Plaintiff having settled with defendant the amount of a claim which plaintiff had on a policy in an Insurance Company of which the defendant was inspector, and which Company had since become insolvent, took from defendant a note for the amount of the claim, signed by defendant, he adding after his signature the word “Inspector.”

*Held* that defendant was personally liable on the note to the plaintiff.

*J. K. Kerr, Q.C.*, for plaintiff.

*Huson W. Murray*, contra.

**ULRICH V. NATIONAL INS. CO.**

*Fire Insurance—Company incorporated by Dominion Legislature—How far bound by 39 Vict. ch. 24, O.*

The defendants are incorporated by 38 Vict., ch. 84, and by sec. 2 they can make contracts of insurance with any person, &c., &c., and “upon such conditions as may be bargained and agreed upon or set forth by and between the Company and the insured.” The Act also apparently incorporated the Company for other than provincial purposes. The eighth plea set up the failure of the plaintiff to comply with two conditions endorsed on the policy, (1) that all differences including liability should be settled by arbitration, &c., and (2) that no action, &c., should be brought till the amount of liability should be settled by arbitration. The replication to this plea set out that the policy was entered into and in force in Ontario after the 1st July, 1876, and as to property therein only, and that the conditions in the 8th plea were not in conformity with 39 Vict., ch. 24, O., nor were they in different coloured ink, and in conspicuous type, &c., &c., as required by that statute. There was also a demurrer to the 8th plea. A verdict was rendered for the plaintiff.

The defendants' contention was, that being incorporated under an Act of the Dominion legislature they were not bound by the Ontario Act referred to, though doing business in Ontario, and even if so bound there, can avail



themselves of the statutable conditions of the Ontario Act, and by condition 15 of that Act a settlement by arbitration is made a condition precedent.

*Held*, 1. That the power to incorporate Companies for other than Provincial purposes is a power impliedly given to the Dominion Legislature, but

2. That it is not necessary to the exercise of that power to do more than give the Company corporate existence, perpetual succession, and power to contract, and not to settle the terms of the contract.

3. That under B. N. A. Act, sec. 92, ss. 11, 13, and 16, the Ontario legislature had power to pass 39 Vict. ch. 24, O., and fix the form and terms of the contracts upon which insurance companies, wherever incorporated, might do business in Ontario.

4. That the conditions on the policy relied on in the 8th plea failed to comply with the Ontario Act, and could not prevail; that the condition 15 in the Ontario Act only referred to fixing the amount and not the liability of the Company, and so did not correspond with the condition on the policy, and was not a condition precedent to the right to sue, but collateral.

5. If condition 15 is read in connection with the policy which states payment is to be made after "the loss shall have been ascertained in accordance with the terms of the policy," then it would be a variation of the statutory conditions of 39 Vict., and so not before the Court, but if so read and before the Court, it would be unreasonable.

*S. Richards*, Q. C., for plaintiff.

*Ferguson*, Q. C., for defendants.

#### CLEMENTSON V. GRAND TRUNK R. W. CO.

##### *Stoppage in transitu—Insufficient Notice.*

W. P., in Hamilton, bought from plaintiffs in England 15 packages of goods, which were shipped at Liverpool, 8th November, 1876, by T. M. & Co., plaintiff's shipping agents, in whose name as consignors the bills of lading were made, W. P. being the consignee. On the 23rd November the way bill of the major part of the goods arrived at Hamilton, and on the same day M. P. & Co., creditors of W. P., obtained an endorsement to them of the bill of lading, and notified defendants on the 4th December. The plaintiffs' branch house at St. John, N. B., were telegraphed by W. P. (who had become insolvent), to detain the goods.

The branch at St. John then immediately telegraphed to the defendants: "Do not deliver earthenware from our English house to W. P.; hold to our order. Clementson & Co." W. P. had a large number of other packages with defendants.

*Held*, that the notice to stop was insufficient, as it did not specify or identify the goods in question, and the plaintiffs' names did not appear in any bill of lading held by the defendants.

*MacKelcan*, Q. C., for plaintiff.

*McMichael*, Q. C., for defendants.

### COMMON PLEAS.

#### IN BANCO. MICHAELMAS TERM.

NOVEMBER 19, 1877.

#### MCDUGALL V. WADDELL, SHERIFF.

##### *Priority of Executions—Division Courts Execution Growing Crops.*

*Held*, in an action for a false return to a writ of *fi. fa.*, goods, that under section 266 of the C. L. P. Act, where a writ has issued against the goods of a party from a Superior Court, and a warrant of execution has issued against the goods of the same party from the Division Court, the right to the goods seized is to be determined by the priority of the time of the delivery of the writ or warrant to the sheriff or bailiff respectively, and not by the priority of seizure.

*Held*, also, that the right acquired by such prior delivery, which, in their case, was to the Division Court bailiff, was not under the circumstances of the case, defeated by his omission to endorse on the warrant, as required by the same section, the time of such delivery.

*Held*, also, that growing crops are seizable under a Division Court execution.

*M. C. Cameron*, Q. C., for the plaintiff.

*Armour*, Q. C., for the defendant.

#### OLIVER ET AL V. GREAT WESTERN RAILWAY COMPANY.

##### *Principal and Agent—Railway Company—Shipping Receipt.*

One C. was the defendants' freight agent at Chatham, and it was so mentioned in the printed notices given by the Company, naming certain places and agents where and to whom

goods could be delivered for carriage, and shipping receipts given. He was a member of the firm of B. & Co., to the knowledge of defendants, but not of the plaintiffs. C. gave a printed receipt or shipping note in the common form used by the defendants, which was filled in by him and signed by his direction by one of defendants' clerks, as was the universal custom at Chatham. The receipts acknowledged that defendants had received from B. & Co. 500 barrels of flour addressed to the plaintiffs to be sent by the defendants' railway. A draft was drawn by B. & Co. to their order on the plaintiffs, and was discounted by the Merchants' Bank on the faith of the shipping receipt which was attached, and was then sent by the bank to Montreal, and accepted by the plaintiffs also on the faith of the shipping note. No flour was ever received by the defendants, but the whole transaction was a fraud on C.'s part. In an action by the plaintiffs against the defendants to recover the amount of the draft,

*Held* (Hagarty, C. J., dissenting), that the defendants were not liable, for that C. in falsely and fraudulently giving the shipping receipt as for goods received by the company when none were received, was not transacting the business of the Company or acting within the scope of his authority as their freight agent.

Per Hagarty, C. J., that the Company who can only act by agents, notify the commercial world that at a named point, their agent C. is authorized to receive produce and give receipts therefor, and in the course of business money is raised from innocent discounters and consignees on the faith of the truthfulness of such receipts. That the defendants' contract was to employ competent and faithful agents, and to be responsible for their defaults and frauds.

*Held*, that the Act, 33 Vict. chap. 19, sec. 3, did not apply, as the receipt did not represent that the flour had been shipped on board the train and thereby as having been received to be forwarded.

*Ferguson, Q. C.*, for the plaintiffs.

*M. C. Cameron, Q. C.*, for the defendants.

DECEMBER 8, 1877.

JOHNSTON V. THE CANADA FARMERS' MUTUAL INSURANCE COMPANY.

*Insurance Policy—Mis-statement in Description—Alteration—Secondary Evidence.*

Action on a policy of insurance on certain buildings, averring a total loss by fire, and per-

formance of conditions precedent. The defence set up by the second plea was that there was a breach of one of the conditions endorsed in the policy in its misstatement of a fact material to be known to the defendants, namely, that by the application, which was stated to be embodied in the policy, plaintiff stated that the buildings were occupied as a dry goods and grocery store, a butcher's shop and a waggon maker's shop. The third plea set up another condition, that, except with the defendant's consent in writing added to or endorsed on the policy, if the premises were altered, appropriated, applied or used for the purpose of carrying on or exercising therein any trade, business, or vocation, which, according to the by-laws and conditions, or class of hazards would increase the risk, then during such alteration, &c., the policy was to cease and be of no force or effect, averring the carrying on of other trades, &c., without such consent, whereby the policy ceased, &c.

*Held*, that the second plea was not proved as it appeared in the application that the premises were described as "dry goods, groceries," and not as "a dry goods and grocery store." Also that this and the third plea were bad in not stating that the matters therein complained of increased the risk, which it was proved that they did not do, in that defendants had charged the plaintiff a much higher rate than the highest of the rates mentioned in the table of rates for the objected trades; and on this ground also the alteration in the occupation was held not to be material.

*Held*, that the production of a form of policy similar to that furnished to the plaintiff and filled in from the application is sufficient secondary evidence of the policy.

*Armour, Q. C.*, for the plaintiff.

*Hector Cameron, Q. C.*, for the defendants.

DAVIS V. VANDICAR.

*Trespass—Costs—Certificates.*

*Held*, that the Act, 31 Vict. chap. 24, sec. 1, O., deprives a plaintiff of costs in all cases of trespass and trespass on the case, no matter what defence may be pleaded, and whether title be or be not alleged to be out of the plaintiff or in the defendant, when the verdict is under \$8.00, and there is no certificate from the presiding judge.

In an action of trespass *quare clausum fregit*, where there was a plea that the land was not

C. P.]

NOTES OF CASES.

[Chan.

the land of the plaintiff, a verdict was obtained for 1s. damages only, and there was no certificate for costs from the presiding judge. The master having refused to tax the plaintiff any costs, the plaintiff obtained a judge's order directing the taxation of full costs.

*Held*, that such order must be rescinded.

*J. K. Kerr*, Q.C., for the plaintiff.

*D. B. Read*, Q.C., for the defendant.

### CHANCERY.

V. C. P.]

[Dec. 12.

BURNS V. CHAMBERLAIN.

*Common Law Procedure Act—Arbitration—Appeal from Award—Practice—Statutes 39 Vict. ch. 28, and 40 Vict. ch. 80.*

A reference was made to W. H. W., one of the local Masters of the Court, in his individual, not official, capacity; the order expressing the same to be by consent, and that the award to be made in pursuance thereof should be appealable in the same manner as a Master's report.

*Held*, notwithstanding such consent, that the award could not be appealed from, and could only be moved against for cause, in the same manner as the award of any of the other arbitrators; the statutes 39 Vict., ch. 20, and 40 Vict. ch. 80, not applying to suits in Chancery.

V. C. P.]

[Dec. 12.

WOOD V. THE HAMILTON AND NORTH-WESTERN RAILWAY COMPANY.

*Railway Company—Right of Way—Arbitration—Demurrer—Agent of Company—Solicitor of Company.*

In treating with the owner of lands for the privilege of crossing the same by a Railway Company, or in proceedings before arbitrators appointed between the owner and the Company, the solicitor of the Company as such, is not qualified to enter into any special agreement binding the Company to construct and maintain a crossing, or that the Company will execute an agreement under seal covenanting to do so.

V. C. P.]

[Dec. 12.

MACNABB V. MCINNES.

*Infant—Education—Presbyterian.*

The mere fact that an infant was the child of parents belonging to the Presbyterian

Church, and she, so far, had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the Master's ruling approving of her being placed and educated at a Seminary, the proprietress of which was a member of the Church of England, it being shown that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that church, and the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends and relatives, and there was the probability of a stricter personal supervision by the proprietress than at a public institution in another part of the country, which was in connection with the Presbyterian Church in Canada.

V. C. P.]

[Dec. 12.

MCDONELL V. REID.

*Parties—Pleading—Demurrer—Interpleader.*

The tendency of modern practice is to dispense with parties, where it can be done with safety: therefore, where in certain interpleader proceedings, one R. disclaimed any right to the proceeds of a sale under execution, and subsequently obtained possession of the property sold by means of a writ of replevin, but afterwards gave notice to the person holding the money that he claimed the proceeds of the sale, and forbade him paying back to purchaser, whereupon the latter filed a bill seeking to recover back the purchase money on the ground of an entire failure of consideration, to which he made R. a defendant, who demurred, as being not a necessary or proper party, the demurrer was allowed with costs, liberty being given to the plaintiff to amend, in order to make a better case, if so advised.

V. C. P.]

[Dec. 12.

ARMSON V. THOMPSON.

*Administration Suit—Claim of Widow in lieu of Life Estate.*

Where land devised, subject to the payment of certain legacies, and to a life estate therein, is, after the death of the testator, sold at the instance of the mortgagee, the money remaining after payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatees will be paid ratably after the value of the life estate has been ascertained.

# Canada Law Journal.

Toronto, January, 1878.

## CONTENTS.

### PART II.

#### NOTES OF CASES:

Court of Appeal .....	21
Queen's Bench .....	21
Common Pleas .....	23
Chancery .....	29

#### ONTARIO REPORTS:

##### COMMON LAW CHAMBERS.

Little v. Lines.	
Arbitration—Reference—Costs .....	28
Gillespie v. Robertson.	
Stakeholder—Lien on Deposit—Interpleader—C. S. U. C., cap. 80 .....	28

##### CHANCERY CHAMBERS.

Sadler v. Smith.	
Examiner's Room—Witnesses—Contempt ..	30

#### LAW STUDENTS' DEPARTMENT:

Scholarship examinations .....	30
Examination questions .....	30
Conveyancing made easy .....	32

#### CORRESPONDENCE .....

#### REVIEWS .....

#### RULE OF COURT .....

#### FLUTSAM AND JETSAM .....

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

From Elec. Ct.] [Jan. 8.

#### RE LINCOLN ELECTION.

##### Defective voters' list.

*Held* (Moss, C. J. A., Burton, Patterson and Morrison, J. J. A.), that the right of a voter, whose name has been entered on the voters' list to exercise the franchise, is not destroyed by the omission of a sufficient description (or any description) of the real property on which his qualification depends.

*Hodgins, Q.C.*, for the petitioner.

*Behune, Q.C.*, for the respondent.

From C. C. York.] [Jan. 8.

#### RE WALKER.

*Insolvent Act of 1876—Composition and discharge.*

The Insolvent Act of 1875 does not contain

any provisions for the joint and separate creditors dealing independently with the estates on which they respectively have a primary lien.

*Held* (Moss, C.J.A., Burton, Patterson, and Morrison, J.J.A.), that a deed made between a member of an insolvent firm and his separate creditors, without reference to the joint creditors is invalid.

*J. K. Kerr, Q.C.* (with him *W. R. Mulock*), for the appellants.

*Rose*, for the respondents.

*Appeal allowed.*

## QUEEN'S BENCH.

### IN BANCO.—MICHAELMAS TERM.

DECEMBER 28, 1877.

#### FLOWES V. MAUGHAN.

##### Married woman—Separate estate.

The plaintiff, a married woman, acquired a farm with her own money, subsequent to the Married Women's Act of 1872. She and her husband and family lived together on another farm at some distance therefrom. The husband sowed the seed on the plaintiff's farm from which the crop of hay seized by the defendant under a *fi. fa.* goods against the husband was raised, but the hay was cut and stacked for the plaintiff as her own property, and the husband had not further interfered in the management of her farm.

*Held*, that the husband not being in the apparent possession or management of the farm, and the same having been acquired by the wife after the Married Woman's Property Act, 1872, it was to all intents the wife's separate estate, and that the hay raised from it was not liable to be seized by the husband's creditors.

Rule absolute to enter verdict for the plaintiff.

*J. Reeve*, for plaintiff.

*F. Osler*, for defendant.

#### BARBER V. MAUGHAN.

##### Chattel mortgage—Renewal of.

*Held*, following *Walker v. Niles*, 18 Grant, 210, and dissenting from *O'Halloran v. Sills*, 12 C. P., 468, that where the affidavit and statement filed on renewing a chattel mortgage

Q. B.]

NOTES OF CASES.

Q. B.

refer to each other and are intended to be read together they may be so read.

The statute requires the statement to set out the interest of the mortgagee in the mortgage and the amount due thereon, and says that the affidavit must vouch for these statements "as true." In this case the affidavit was that the statement "truly and correctly" set forth, &c. *Held* sufficient.

*McMichael*, Q. C., for plaintiff.

*Robinson*, Q. C., for defendant.

#### O'DONOHUE V. WILSON.

*Chattel mortgage—Sufficiency of.*

Plaintiff's chattel mortgage recited "whereas the said mortgagee hath endorsed at the request and for the accommodation of the mortgagor . . . a promissory note . . . for \$1,000," &c. The mortgage witnessed that the mortgagor, in consideration of such endorsement made before the execution of the mortgage, hath granted, &c. Plaintiff's affidavit stated that he endorsed the note; that the mortgage was executed in good faith and expressly to secure the payment of the note and security, and indemnity to plaintiff against said endorsement, and not for the purpose "of protecting" the goods, &c., covered by it from the creditors of mortgagor.

The bona fides of the mortgage was admitted, but it was contended that the recitals and the affidavit were insufficient under the statute; the recital because it did not set out the nature of the agreement between the parties, and the affidavit for non compliance with the statute in several particulars.

*Held*, that the mortgage and affidavit complied with the statute.

*O'Donohue*, for plaintiff.

*Donovan*, for defendant.

#### FITZHENRY V. MURPHY.

*Seduction—Contradictory evidence—Excessive damages.*

In this case the evidence was directly contradictory. The plaintiff, a married man, was an engine driver, and the girl his servant. There were circumstances which if the defendant was guilty would tend to inflame the minds of the jury, and there was no particular evidence of defendant's circumstances. The jury found a verdict of \$2,000.

The Court refused to set aside the verdict as excessive.

*Meredith*, Q. C., for the plaintiff.

*MacMahon*, Q. C., for defendant.

#### BURGESS V. BANK OF MONTREAL.

*Tax Sale—Insufficient Description—32 Vict., cap. 36, sec. 155, O.*

On the 9th November, 1860, the day of the sale, a sheriff gave a certificate to a purchaser of lands sold for taxes, describing the lands as "5 acres of land to be taken from the S. W. corner of the S. W.  $\frac{1}{4}$  of lot 3, in the 11th con. of East Zorra." The Sheriff's book described the lands sold as "5 acres from the S. W. corner," &c. On the 17th September, 1866, the Sheriff who sold the land having died, his successor made a deed of the land to the purchaser, describing it by metes and bounds, making the land conveyed nearly a square at the S. W. corner.

*Held*, that the description in the certificate being indefinite and the deed made by a different Sheriff, it was impossible to identify the land sold, and the sale was void.

*Held* also, that the defect was not one cured by 32 Vict., cap. 36, sec. 155, O.

*Bethune*, Q. C., for plaintiff.

*Becher*, Q. C., for defendants.

#### REGINA V. NASMITH.

*Criminal law—Neglect to maintain a wife—32-33 Vict., ch. 20, sec. 25.*

An indictment under 32-33 Vict., cap. 20, sec. 25, against a prisoner for neglect to maintain his wife need not allege that the wife is ready and willing to return and live with the husband, and such allegation, if inserted, need not be proved, and may be struck out.

Under this Act the Crown must make out such a case as would entitle the wife to a decree for alimony in equity.

In this case it did not sufficiently appear that the wife was in want of food, clothing, &c., or that the husband had the ability to provide it; the conviction was therefore quashed.

*Irving*, Q. C., for the Crown.

*W. Francis*, for the prisoner.

#### REGINA V. HAINES ET AL.

*Criminal law—Trial by Judge—32-33 Vict. cap. 21, sec. 1104.*

*Held*, that where prisoners elect to be tried before a judge alone, the judge has the power to find them guilty of an offence under 32-33

Q. B.]

NOTES OF CASES.

[Q. P.]

Vict., cap. 21, sec. 110, in like manner as a jury could have done. *Ex. gr.*, he could, if the prisoners are charged with larceny, and the offence proved is falso pretences, find them guilty of the latter offence.

*Hardy, Q. C.*, for the Crown.

*H. J. Scott*, for prisoners.

#### GIBSON V. CITY OF OTTAWA.

*Municipal corporation—Liability for work not contracted for.*

Plaintiff, engaged under a contract with the Water Commissioners of Ottawa to excavate certain soil and rock, and remove it not farther than 300 feet from the said works, was directed by the Engineer of the Water Commissioners to break up the material and spread it on the arches and approaches of a bridge built by the city, the defendants. The chairman of defendants' Board of Works verbally agreed to this.

*Held*, that plaintiff could not maintain an action for this work against defendants—a municipal corporation—though the work was necessary to the completion of the bridge and was a public benefit, as it had not been ordered or payment provided for it.

*Beaty, Q. C.*, for plaintiff.

*Bethune, Q. C.*, for defendants.

#### HALL V. EVANS.

*Statute of limitations—Easements—Ancient light.*

*Semble*, that the recent statute of limitations of Ontario does not extend to easements.

The defendant and plaintiff occupied adjoining lots in a city, and defendant had had windows in his house on the plaintiff's side for over twenty years, and would in respect to these windows have acquired an easement, but that during the statutable period of 20 years he raised his house higher than the height of the windows, so that no portion of the windows in the new portion occupied any portion of them in their first position.

The law as to ancient lights in Ontario discussed, and the cases collected.

*Beaty, Q. C.*, for plaintiff.

*Ferguson, Q. C.*, for defendant.

#### BEIGLE V. DUKE.

*Possession—Statute of Limitations.*

Where a patentee of a half-lot of 100 acres, in 1837, built a house on the south half of it, cleared land and cultivated it for a few years, and then sold first the south half of the lot, 50

acres, and then the quarter immediately north of it, and left the country and never returned to the lot.

*Held*, that she had under the circumstances taken actual possession of the North  $\frac{1}{4}$  undisposed of by her, so as to disentitle the plaintiff of the right to bring an action to recover possession under C. S. U. C., cap. 88, sec. 3, as amended by 27-29 Vict. cap. 29.

*Armour, Q. C.*, for the plaintiff.

*J. W. Kerr*, for the defendant.

#### VANSICKLE V. KELLY.

*Will, construction of—Right of way.*

A testator by his will gave one-half of a lot to his son C. and the other half to his son W., and declared that in order to render it convenient for C. to obtain free access to his land from a side road, that a lane then running across the land devised to W, commencing at a gate named should "be kept and remain open for the free access" of C., his heirs and assigns.

*Held*, that the testator's intention was that the lane should remain in its condition at the time he bequeathed it, and that the words "shall be kept and remain open," did not give defendant, who claimed under C., the right to remove the gate.

*Osler, Q. C.*, for plaintiff.

*Robertson, Q. C.*, for defendant.

#### COMMON PLEAS.

##### IN BANCO.—MICHAELMAS TERM.

DECEMBER 19, 1877.

##### MURPHY V. THOMPSON.

*Contract—Statute of Frauds—Authority of agent.*

On the 5th January, 1877, the defendant, at Toronto, wrote to the plaintiff at Mount Forest, stating that "our Mr. Peters," defendant's agent, "advises me that you have a car or two of hogs" and requesting plaintiff to state average weight and lowest price for one or two cars. It did not appear whether there was any answer to this or not; but on the 19th January, Peters telegraphed the plaintiff from Harriston, to name lowest for one or two cars of hogs and give average. The plaintiff telegraphed Peters in reply, "Will take seven-ten

here, average two hundred." To which Peters telegraphed in reply: "Will accept your offer, seven-ten, \$7.10 Order cars. Coming to-day." The defendant objected that there was no complete contract within the Statute of Frauds, as the words "Order cars" must be read, "Provided you order cars, thereby adding a new term to the contract, which had never been agreed to by the plaintiff; and also, that Peters in accepting for defendant had exceeded his authority, which was limited as to price; and in proof of such limitation telegrams which had passed between Peters and defendant, but of which the plaintiff was ignorant, were put in evidence. The jury found that the agency was a general one, and they entered a verdict for the plaintiff.

*Held*, that the plaintiff was entitled to recover; that there was a complete contract, the words "order cars" not having the effect contended for them; and that Peters had authority to bind the defendant.

*Cattanach*, for the plaintiff.

*M. C. Cameron*, Q.C., for the defendant.

#### NORVAL V. CANADA SOUTHERN R. W. CO.

##### *Land—Compensation—Ejectment.*

The Canada Southern Railway Company requiring certain land owned by the plaintiff for the purposes of their railway, gave the plaintiff notice, under the Statute, of their so requiring it, and of their willingness to pay him \$1,000 as compensation, and further notifying him that in case of his refusal to accept, an application would be made to the County Judge for immediate possession. The plaintiff having refused the compensation and to give defendants possession, they accordingly made application to the County Judge, and on giving the necessary security for the payment of the amount to be awarded within a month thereafter, obtained a warrant placing them in possession. On 21st March, 1876, an award was made which, after reciting all the proceedings as regular and sufficient, awarded the plaintiff \$7,260 as compensation. The Company did not pay the amount awarded, but, acting under 38 Vict. ch. 15, appealed to a single judge to set the award aside or reduce the amount awarded on the ground of its being excessive. The case was heard, and on 10th March, 1877, judgment was delivered, dismissing the appeal. The Company then gave notice of appeal to the Court of Appeal. The plaintiff contended that the Company, by not paying the amount

awarded within the month had lost their right to possession, and he brought ejectment.

*Held*, that the action would not lie, for the defendants having obtained the possession lawfully could not be deemed to be trespassers merely by reason of their taking advantage of the appeal afforded them to the single judge by the Statute; and that plaintiff's remedy was confined to the award.

DECEMBER 29, 1877.

#### DOYLE V. CARROLL.

*Promissory notes given to prevent a forgery becoming public—Right to recover on.*

In an action on two promissory notes, it appeared that the defendant's son had committed forgery, and the jury found that the notes were given by the defendant, the father, for the money thus obtained by the son, in order to prevent the scandal of the forgery being made public.

*Held*, that there could be no recovery on the notes.

*McMichael*, Q. C., for the plaintiff.

*Robinson*, Q. C., for the defendant.

#### ROSS V. EBY.

*Agreement—Sale of Goods—Property passing.*

By a written agreement, dated 19th February, 1876, made between the plaintiff and one Craig, Craig agreed to sell to the plaintiff the *Telescope* newspaper, job office, and subscription list, for \$2,000; \$500 to be paid on giving possession, Craig to be released at the same time of a mortgage of \$500 to one Cooper on the plant, and to receive houses, &c., at a price to be ascertained. For the balance, which was to be paid within a year, from the date of the payment of the first instalment, Craig was to retain the Gordon press in the office, and such further portions of the jobbing plant as would fully secure him until he was paid. The agreement was only to take effect if Craig obtained an appointment in the Inland Revenue service; when it was immediately to take effect, as the newspaper was his only means of support. For the part retained by the plaintiff he was to pay rent equal to eight per cent. on the balance unpaid.

On the 1st March, Craig received the Government appointment, and on the evening of the 12th March the plaintiff paid \$400 on account of the \$500 instalment, having obtained time for the payment of the balance thereof;

and it was contended by the plaintiff that what then took place, constituted a delivery of the premises and property in the goods to the plaintiff, while for the defendant it was contended that no such delivery took place, but that the matter was to be completed on the following morning, when not being completed, Craig sold the goods to the defendant. The plaintiff having brought an action of detinue against the defendant,

*Held*, that he could not recover for that, under the agreement, the property in the goods was not to pass, until in addition to the payment of the \$500, the Cooper mortgage was paid off; the horses, &c., delivered over, and the portion of the goods on which Craig was to have his lien ascertained.

*Bain*, for the plaintiff.

*Bethune, Q. C.*, for the defendant.

#### SAMUELS V. COLTER.

*Chattel mortgage—Absence of re-demise—Seizure before default—Right of action.*

In this case the Court followed *McAuley v. Allen*, 20 C. P., 417, and held that an action will not lie at the suit of the mortgagor of chattels against the mortgagee for seizure of the chattels before default in payment or of any of the conditions of the mortgage, where there is no re-demise clause in the mortgage.

*Osler*, for the plaintiff.

*R. M. Meredith*, for the defendant.

#### WESTGATE V. WESTGATE.

*Ejectment—Equitable defence—Injunction—Order to execute conveyance.*

In ejectment to recover certain land, defendant set up a defence on equitable grounds, alleging that, in consideration of the defendant working and serving the plaintiff and managing his affairs, the plaintiff promised, as a reward therefor, to give the defendant the land, and the immediate possession thereof; that the defendant was put into possession and worked, &c., for a great number of years, and improved the land, and by his diligence greatly contributed to the accumulation of the plaintiff's property; that the plaintiff, in furtherance of his promise, and in consideration of the said services, etc., entered into a written agreement to give defendant the land, thereby confirming defendant in his possession, and defendant thereafter made improvements, and was assessed and paid the taxes on the land: that defendant had paid the full consideration

for the purchase thereof, and had performed all conditions, etc., to entitle him to hold possession, and to all the plaintiff's rights in the land.

At the trial the plea was proved; but the plaintiff contended that the defendant could not set up title in himself, because in 1874, he had obtained possession from one Edwards, who was then in possession as the plaintiff's tenant, and had paid to the plaintiff \$70, due to the plaintiff by Edwards for rent.

The Court held, that under the A. J. Act of 1873, the defendant was entitled to hold the possession, though he had obtained it from the plaintiff's tenant, although before that Act he would not have been able to do so, but would have been driven to a suit in Equity for specific performance of the agreement; and they ordered the verdict which had been entered for the defendant to stand; and granted a perpetual injunction against plaintiff taking any proceedings at Law to eject defendant, and also ordered the plaintiff to execute a conveyance.

*Osler*, for the plaintiff.

*McMahon, Q. C.*, for the defendant.

#### WHEELHOUSE V. DARCH.

*Contractor—Liability for default of—Lateral support—Right to.*

In this case it appeared that the defendant's contractor so negligently dug a trench to lay the foundation of a house the defendant intended building on her land adjoining the plaintiff's as to undermine and take away the support to the wall of the plaintiff's house, so as to cause it to fall down.

For the defendant it was objected that there was no liability, as it was not the defendant's personal default; also, that no liability attaches where, as here, the relationship of employer and contractor exists; but only where it is that of master and servant; and also, that the defendant had the clear right to excavate on his own soil, without any right in the plaintiff to lateral support, or at all events that such support is limited to the land in its original state and not to the superincumbent weight of the house.

The Court held that defendant was liable for the default of his contractor; and that the objection as to the right to the lateral support were not tenable.

*Bethune, Q. C.*, for the plaintiff.

*Rock, Q. C.*, and *H. J. Scott* for the defendant.



## KILBORNE V. RUSS.

*Promissory notes—Stamps—Executor—Reading.*

A declaration by plaintiff, executor of the estate and effects of Jacob Kitchen, deceased, under his last will and testament, proceeded to state a cause of action upon a promissory note made by the defendant, payable to Jacob Kitchen, or bearer, averring that the plaintiff became the bearer of the said note, and non-payment.

The defendant pleaded want of stamps, to which the plaintiff replied that when he became the holder of the note he had no knowledge that the note was not stamped, and that as soon as he acquired such knowledge, which was since the commencement of the action, he affixed double stamps.

The defendant demurred on the ground that if the testator Kitchen had not stamped the note in his lifetime, the plaintiff, as his executor, could not do so without averring that Kitchen himself had no notice that the note was not duly stamped.

*Held*, that on this record the plaintiff must be taken to have stated a cause of action accruing in his own right, and that the words (executor, &c.,) were merely descriptive.

*Oster*, for the plaintiff.

*McClive* for the defendant.

## PEGG V. NASMITH ET AL.

*Contract—Engineer's certificate—Condition precedent—Unnecessary plea ordered to be struck out*

Action on the common counts for work and labour done by J. B. and W. B., alleging an assignment in writing to the plaintiffs.

There was also a special count setting up a written agreement, whereby the said J. B. and W. B. promised, covenanted and agreed to execute and complete, according to specifications certain grading and grubbing at certain named prices, and that defendants in consideration thereof promised and agreed to pay them the said prices, according to the amount of work executed and completed by them; that the said J. B. and W. B., in pursuance of their said agreement executed and completed certain specified amounts of grading and grubbing, but that defendants did not pay them or either of them for the same. The declaration then averred an assignment in writing to the plaintiff, and non-payment to him.

Plea: that by the said indenture in the last plea mentioned and by the said contract and agreement therein mentioned and referred to,

it was further covenanted and agreed by and between the said J. B. and W. B. and the defendants, that all points in dispute, whether as to the quantities and qualities of work or material should be left to the decision of an engineer named, and from that decision there should be no appeal; that the alleged cause of action of the said J. B. and W. B. in the declaration mentioned, and alleged to be assigned to the plaintiff are matters in dispute as to the quality and quantity of work alleged to have been done by the said J. B. and W. B. in performance and execution of the said contract and of the covenants, provisions and agreements contained therein; that the said engineer has not determined or decided that the said J. B. or W. B. or the plaintiff, are or is entitled to any sum of money whatsoever.

*Held*, by Wilson, J., plea bad; for, so far as appeared therefrom, the defendant's liability arose independently of the covenant to refer, and did not preclude the plaintiffs from suing until he had obtained the engineer's decision, though he might be liable for a breach of covenant for not referring.

The case was re-heard before the full Court, when, by consent the former plea was put in, which the Court considering sufficient to raise the defence set up by the eighth plea, they ordered the eighth plea to be struck out.

*McCarthy*, Q. C., and *Boulbee* for the plaintiff.

*T. S. Kennedy*, for the defendants.

## BURNHAM V. WADDELL.

*Landlord and tenant—Landlord purchasing at bailiff's sale—Sale of goods—Bill of sale—Change of possession.*

The plaintiff leased certain premises to P. and W., and the rent being in arrear, he caused the goods in question to be distrained, and after an unsuccessful attempt by the bailiff to sell them, the plaintiff with the tenants' consent became the purchaser. The goods were subsequently seized by the sheriff under executions against the tenants, and were sold by him. The plaintiff having brought an action of trover against the sheriff,

*Held*, that he could not recover, for in no event could the sale to him be supported; for if he claimed as a purchaser at the bailiff's sale, he could not as landlord become such purchaser; and, if he claimed as an ordinary vendee from the tenants, the sale would be void as against creditors, as the evidence shew-

C. P.]

NOTES OF CASES.

[C. P.]

ed there was no bill of sale registered under the Statute, nor any actual and continued change of possession.

*Hector Cameron, Q.C.*, for the plaintiff.

*Armour, Q.C.*, for the defendant.

#### THOMPSON ET AL. V. DICKSON.

*Married woman—Separate estate—Promissory note.*

Action against the defendant, a married woman, on a promissory note made by her to her husband's order, and endorsed by him to the plaintiffs. As evidence of the defendant being possessed of separate estate, it was proved that under the will of her father, who died in 1849, she was left 100 acres of land: that she married in 1858 while a minor; and that neither she nor her husband took possession of the land until she was twenty-one years of age.

*Held*, following *Johnston v. White*, 40 U. C. R., 309, that the land in question was not such separate estate as the law contemplates being bound at law for the wife's debts and engagements.

*Quære*, whether a note made by the wife to the husband and void as between them obtains vitality by being endorsed over by the husband to a third person.

*Foy*, for the plaintiff.

*J. E. Robertson*, for the defendant.

#### RE PETITION OF MINISTER OF EDUCATION.

*Union School Section—Illegal formation—Subsequent Act legalizing—40 Vic., ch. 16, sec. 11, sub-sec. 11—Debentures.*

In September 1874, the Reeves of the townships of East Nissouri and North Oxford, with the County Superintendent proceeded to form a Union School Section, comprising School Sections No. 1, North Oxford, and No. 5, East Nissouri. In January, 1875, and ever since, trustees were elected for the Union Section, as also for Section No. 1, North Oxford. And from the same date this Union Section has maintained a school-house for the Union, at which some of the North Oxford children attended. The Union Section levied school rates for 1875 over the whole Union Section, but none was levied by Section No. 1; and the Legislative grant for 1875-6 was paid to the Union Section, but under objection from Sec. No. 1. On the 28th June, 1876, it was decided in the case of *Halpin v. Calder*, 23 C.P., 501, that the Union section was illegally formed,

and that there was no right to levy for Union purposes in Section No. 1. Immediately after that decision, Section No. 1, bought additional land and erected a new school-house, levied a school rate for the year 1876, and issued debentures, which are still outstanding. The school in Section No. 1, was closed from 1st April, 1875, to 31st December, 1876; but since the last named date has been kept open. On the 2nd March, 1877, the Act 40 Vic., ch. 16, sec. 11, sub-sec. 14 was passed.

The Court in answer to the petition, were of opinion, Gwynne, J. dissenting, that the Union Section existed as a fact on the passing of the Act, and was legalized by it, and absorbed Section No. 1, which therefore ceased to exist, but that further legislation might be necessary to provide for the debentures issued by School Section No. 1.

*Rock, Q.C.*, and *T. Wells*, (Ingersoll), for the Union Section.

*Read, Q.C.*, and *Ball, Q.C.*, for Section No. 1, North Oxford.

*J. G. Scott, Q.C.*, for the Minister of Education.

#### PEERS V. BYRON.

*Ejectment—Tenant claiming as owner—Right to insist on notice to quit.*

In ejectment, it appeared that defendant was put into possession of certain land as tenant from year to year, and paid rent. Subsequently he claimed the land as owner, and refused to pay any more rent; and at the trial, after claiming the land as such owner, and putting the plaintiff to proof of his title, set up that a six months' notice to quit had not been given, determining the tenancy.

*Held*, that the defendant having repudiated and disclaimed the tenancy, could not at the last moment treat it as still subsisting, and insist on a notice to quit.

*Read, Q.C.*, for the plaintiff.

*J. K. Kerr, Q.C.*, for the defendant.

#### RAMSAY V. STAFFORD.

*Lease—Surrender—Authority of wife—Evidence.*

The plaintiff, a tenant of certain land, went away leaving his wife in possession, and she after his departure surrendered the lease to the landlord on payment of a sum of money, it being agreed at the same time that she might occupy the dwelling house on the place at a named rent. The tenant subsequently returned

C. P.]

NOTES OF CASES—LITTLE V. LINES—GILLESPIE V. ROBERTSON.

[C. L. Cham.

and brought an action against the landlord for entering on the demised premises and seizing and selling the crops.

The Court held, and even assuming that the wife had no authority to surrender the term, the plaintiff by his conduct as appearing by the evidence after his return, as also his paying six months' rent of the house, under a new and inconsistent tenancy, was precluded from recovering.

*Robinson, Q.C.*, for the plaintiff.

*S. Richards, Q.C.*, for the defendant.

#### BLACK V. MOTTASHED.

*Agreement to appoint indifferent valuator—Breach of—Acceptance of person appointed.*

By an agreement on the sale of goods, the price was to be ascertained by indifferent valuers to be appointed by the parties; and for a breach of the agreement, to appoint such indifferent valuers, or to comply with the valuation, a sum of \$200 was to be recoverable as liquidated damages. The parties did not appoint indifferent valuers, but the persons appointed were accepted without objection, and made a valuation. The vendor refused to comply with the valuation on the ground of its not being made in accordance with the agreement; and on this ground an action brought against him to recover the \$200, as liquidated damages for breach of the agreement, failed. The vendor then brought this action against the purchaser to recover the \$200 as liquidated damages for the breach of the agreement to appoint an indifferent valuator.

*Held*, that this action would not lie as the appointment had been accepted without objection.

*M. C. Cameron, Q.C.*, for the plaintiff.

*Diamond*, for the defendant.

### CANADA REPORTS.

#### ONTARIO.

#### COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. BUCK, M. A. Student-at-Law.)

#### LITTLE V. LINES.

*Arbitration—Reference—Costs.*

*Held*, that under the usual order of reference (Chit.

forma, 9th ed. p. 198), giving the arbitrator all power as to amendments of pleadings and otherwise, the arbitrator has power to certify for full costs, and that consequently when the arbitrator had not certified, a judge in chambers has no power to do so.

[November 12, 1877—Mr. DALTON—WILSON, J.]

A summons was taken out, calling on the defendant to show cause why an award made between the parties should not be referred back to the arbitrator, on the ground that he had neglected to certify for full costs, or why the judge in chambers should not certify for costs, under Rule 155. The order of reference followed Chit. Forms, 9th ed. p. 893, verbatim. The arbitrator found \$73 to be due the plaintiff, and did not certify for full costs. It was alleged that \$145 had been paid after the issue of the writ, and that the arbitrator had taken this sum into account in making his award. It was also alleged that the arbitrator had not certified because he thought he had no power to do so under the order.

Mr. Ponton (Beatty, Hamilton & Cassels), for plaintiff, contended that the arbitrator had no power under the order to certify. Such power must be given by the order in express terms, the words used therein having reference only to amending and adding pleadings, and disposing of record, &c.

*H. J. Scott*, for defendant. A judge in chambers has no power to refer back the award. The order gives the arbitrator full power to certify.

Mr. DALTON.—The motion to refer back is a motion which must be made in Court. The words of the order giving the arbitrator "all powers as to amendments of pleadings and otherwise, as a judge sitting at Nisi Prius," I think, give him power to certify, and if so a Judge in Chambers has no such power: *Calder v. Gilbert*, 3 Prac. R. 127. The summons must be discharged, but, under the circumstances, without costs.

From this judgment the plaintiff appealed to WILSON, J., who, however, refused a summons.

Reported for the *Law Journal* by N. D. BUCK, Student-at-Law.

#### GILLESPIE V. ROBERTSON.

*Stakeholder—Lien on deposit—Interpleader—C. S. U. C., cap. 30.*

A stakeholder allowed to retain, out of the moneys in his hands, a sum sufficient to cover his cost of an interpleader brought to try the right to the stakes.

[December 21, 1877—Mr. DALTON.]

This was an action brought to recover the

amount of a sum of money and a promissory note deposited by one Davenport with the defendant as a bailee, to be delivered to the plaintiff on the performance of certain conditions contained in an agreement between Davenport and the plaintiff. The defendant, who was an attorney, had drawn up this agreement and transacted some further professional business between the parties relative to the subject matter of the suit.

On the 21st October, 1876, an order was made in Chambers, under C. S. U. C., cap. 30, directing an issue between the plaintiff and Davenport, as to the right to the money and the note; the order proceeded as follows:—"That the costs of the defendant in this action and incidental to this action in reference to the subject matter of the said action and of this application, be paid by the unsuccessful party in the said issue, and that the said defendant in this action shall deliver up the said property the subject matter of this action to the successful party in the said issue, upon payment of any lien or claim which he may have thereon."

The issue having been decided in Davenport's favour, on 13th December, 1877, on the return of a summons which had been served on the defendant's agent, an order was made for the payment by the plaintiff of Davenport's and the defendant's costs, and for the delivery to Davenport of the sum of money and the note in the defendant's hands. On the 18th December, 1877,

*Crickmore* filed an affidavit of defendant stating that he believed the plaintiff was in insolvent circumstances, and that he would lose the costs he had incurred unless he were allowed to retain them out of the money in his hands, and obtained a summons to show cause why the order of the 13th December should not be varied by providing that the defendant should be at liberty to retain out of the money and note in his hands, the costs therein directed to be taxed and paid to him by the plaintiff, and also the amount of any lien or claim to which he should appear to be entitled, and that the master of the Court should be directed to take an account of the amount of such lien.

On obtaining the summons the following authorities were cited:—*Ch. Arch. Prac.* 1399; *Simon's Law of Interpleader*, 2nd Ed. 31; *Pitchers v. Edney*, 4 Bing. N. C. 721; *Duer v. Mackintosh*, 3 Moo. & Sc. 174, 2 D. P. C. 730; *Parker v. Linnett*, 2 D. P. C. 562; *Reeves v. Barraud*, 7 Scott, 281.

On the return of the summons, *Aylesworth* shewed cause. The defendant, upon obtaining the interpleader order, being obliged to shew (sec. 1), "by affidavit or otherwise that he does not claim any interest in the suit &c.," cannot now set up any lien, at all events he has no lien for any costs incurred before the commencement of the suit, and the provision in the interpleader order respecting the defendant's lien should not have been inserted: *Braddock v. Smith*, 9 Bing. 84, 2 Moo. & S. 131; *Deller v. Prickett*, 20 L. J. N. S. Q. B. 151. Defendant and Davenport being equally innocent, there is no reason why Davenport should pay defendant's costs. The English cases cited in support of the summons, were all cases in which the funds were directed to be paid into Court in the first instance, and the stakeholder's costs of the application were allowed to be deducted from such payment.

*S. R. Crickmore*, contra.

MR. DALTON said that the defendant having accepted the position he did between the parties at the request and for the convenience of both of them, they should keep him harmless, and the order he would make would be that the order of the 13th of December should be varied so as to provide that the defendant should be at liberty to retain out of the sum in his hands his costs incurred in the suit and in the interpleader proceedings, and that Davenport might add them to his costs against the plaintiff, but that defendant should not be entitled to retain anything for costs or charges incurred before the commencement of the suit, and that, as he had been served with the summons upon which the order of the 13th December was made, he should have no costs of this application.

*Order accordingly.*

Chan. Cham.]

SADLER V. SMITH—LAW STUDENTS' DEPARTMENT.

## CHANCERY CHAMBERS.

(Reported for the *Law Journal* by H. T. BRICK, M. A.,  
Student-at-Law.

## SADLER V. SMITH.

*Examiner's Room—Witnesses—Contempt.*

*Held*, that under 34 Vict., cap. 12, sec. 9, a special examiner has power to exclude witnesses from his room during an examination, and he may exercise such power when the witness is a party to the suit.

*Held*, also, that a refusal to comply with the ruling of an examiner, in not withdrawing when ordered so to do, is a contempt of court.

[November 12, 1877.—PROUDFOOT, V.C.]

This was a motion for the costs occasioned to the plaintiff by the postponement of an examination and of a motion for an injunction, caused by the refusal of a witness to withdraw from an examiner's room during the examination of other witnesses. The examination of a witness on a motion for an injunction in the suit, of which motion notice had at that time been given, was being proceeded with, when the defendant in the suit entered the examiner's room. The plaintiff's solicitor asked that he might be excluded during the continuance of the examination. The solicitor for the defendant contended that the examiner had no power under the Act, to exclude witnesses. The examiner, however, held that he had power, and requested the defendant to withdraw, which he refused to do, on being so advised by his solicitor. The examination was thereupon postponed at the request of the plaintiff. The motion for an injunction was also postponed, the examination not having been taken at the time the motion was returnable.

*Donovan* for the plaintiff.

Mr. Doyle (J. O'Donohoe) for the defendant.

PROUDFOOT, V.C.—I am of opinion that the examiner had power to exclude the party from his room. An examiner is bound to observe the rules of evidence. If a party is dissatisfied with an examiner's ruling, he should nevertheless acquiesce. I think the refusal to withdraw was a contempt. The plaintiff is entitled to the order with the costs of the motion.

## LAW STUDENTS' DEPARTMENT.

## SCHOLARSHIP EXAMINATIONS.

The following is the result of the Examinations for Scholarships, held on the 29th and 30th November last :—

*First Year.*—P. H. Drayton, 226; B. F. Justine, 196; McCarthy, 171.—*Maximum*, 300.

*Second Year.*—W. Nesbitt, 278; F. Hodgins, 270; S. J. Weir, 170.—*Maximum*, 300.

*Third Year.*—H. P. Sheppard, 276; N. D. Beck, 236; Wm. Fletcher, 196; Patterson, 123.—*Maximum*, 300.

*Fourth Year.*—T. Ridout, 320; T. P. Galt, 312.—*Maximum*, 480.

The Examiners in their report directed the attention of the Benchers to the exceedingly good examinations passed by Mr. Galt and Mr. Hodgins, who stand second in the fourth and second years respectively, each of these gentlemen being so close to the competitor who succeeded in obtaining the first place as to make the question of competitive merit a difficult one to decide, and suggested the propriety of awarding additional scholarships to Mr. Galt and Mr. Hodgins; the suggestion, however, was not adopted by Convocation.

## EXAMINATION QUESTIONS.

CERTIFICATE OF FITNESS, MICHAELMAS  
TERM, 1877.

*Leith's Blackstone—Taylor on Titles.*

1. State precisely the rule as to deeds and wills proving themselves after the lapse of time.
2. In examining a title it appears that one of the deeds was executed under a power of attorney. To what points should attention be particularly directed? Give the effect of any legislation which may have rendered attention to some of the points unnecessary.

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

3. Give the rule laid down in "Taylor on Titles" as to the circumstances under which the Court of Chancery will force a purchaser to take a title which he contends is doubtful?

4. What is the law as to presumption of death after absence in a question of title between vendor and purchaser?

5. What power has the Court of Chancery as to appointment of trustees?

6. Are Private Acts of Parliament of themselves notice to purchasers? What is the effect of a clause in such an Act declaring it to be a Public Act?

7. At a sale under execution of an equity of redemption, the mortgagee becomes the purchaser. State fully the rights of the mortgagor.

8. State the effect of the section relating to dispositions by tenants in tails for limited purposes in the Statute relating to the Assurance of Estates Tail.

9. What is the law relating to merger, when the legal estate and equity of redemption meet?

10. What is the meaning and the effect of the Statute which declares that "corporeal hereditaments shall, as regards the conveyance of the immediate freehold, be deemed to lie in grant as well as in livery?"

*Smith's Mercantile Law—Common Law Pleading and Practice, and Statute Law.*

1. State the different ways in which the contract of partnership may be dissolved, with special reference to proper precautions to be taken on the happening of that event, and any statutory provisions relating thereto.

2. What is a bill of lading, and what is the effect of an endorsement of it: (a) At common law, (b) By statute.

3. Under what circumstances, if any, is a married woman liable on a promissory note made by her?

4. Is a shipowner liable for damages to goods shipped on board his vessel, where the damage occurs through misconduct of a pilot whom he is compelled by law to take on board? State fully the reasons for your answer.

5. Where a surety has entered into a bond for payment in default of the principal debtor, and the creditor extends the time for payment by the principal debtor, and afterwards sues the surety on the bond at law, what remedy has the surety? Give reasons for your answer in full.

6. What is the rule as to appropriation of payment? Within what time after payment on account can a creditor make an appropriation?

7. A is employed by B to make some repairs on a chattel, and the chattel is left with A for that purpose. Nothing is said about payment, but A owes B an amount greater than the amount properly chargeable. In what position will A stand (1) in case of action brought by him to recover the value of his work done? (2) In case of an action of detinue brought for delivery of the chattel? Explain fully, referring to any statutory enactments which may affect your answer.

8. What is the effect of a plea of "Not Guilty" in an action of tort against a carrier? Give authority for your answer.

9. Give the form of a jurat to an affidavit made by two or more deponents. To what extent is it imperative to comply with this form, and why?

10. If a Judge at *nisi prius* refers a cause by the usual *nisi prius* order to an arbitrator, and the arbitrator in dealing with the case makes a mistake in law or fact, what remedy have suitors?

*Equity.*

1. A buys in his own name, by entirely separate contracts, two parcels of land. In making these purchases, A acted as agent for B, who paid the purchase money for one parcel only, A advancing his money to pay for the other parcel. B tenders to A the purchase money advanced by him, and demands a conveyance to himself of both parcels, which A refuses, and denies the existence of any trusts for B, and there is no writing by which to establish a trust. What, if any, are B's rights in respect to these parcels of land? Explain.

2. Under what circumstances, and by what authority, may the Courts of Law or Equity in this Province appoint a person to represent the personal estate of a deceased person? Wherein do the powers of the person so appointed differ from those of a legal personal representative, appointed by the Surrogate Court.

3. On the sale of lands the vendor in proof of title produces registered memorials, but not the instruments to which they relate. Under what circumstances are these memorials sufficient evidence of the instruments of which they purport to be memorials?

4. A being possessed at the time of his death of certain property, real and personal, dies intestate, leaving several children.

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS—CONVEYANCING MADE EASY

Under what circumstances may one or more of these children be excluded from any share in the estates?

5. Certain lands situate in the United States, are vested in A, a resident of Toronto, in trust to account for the rents thereof to B. On A's refusal to account, what jurisdiction, if any, has our Court of Chancery to grant relief?

6. It is provided by the Act of Incorporation of a mining company that if any shareholder makes default in punctual payment of any instalments called up on his subscribed shares, the shares themselves and all prior payments made on account thereof, shall be forfeited. A shareholder who has paid several instalments on his shares, refuses to pay a further call which has been regularly made, insisting that instead of forfeiting his shares, the company should sell them, apply the proceeds in paying up the stock and pay over the surplus, if any, to him. This the company refuses to do, and declares the shares forfeited, although had they sold the shares as requested, a far larger sum than was required to pay up the whole unpaid portion of the stock, would have been realized. Is the shareholder entitled to any relief against the company? Explain fully.

7. Several persons being tenants in common of certain lands mortgage the same, and the mortgagee enters into and continues in possession for ten years. In the ninth year of his possession the mortgagee gives to one of the mortgagors only a written acknowledgment to the other mortgagors. Who is entitled to redeem?

Suppose the foregoing had been the case of one mortgagor, and several mortgagees under the same instrument, and each mortgagee entitled to an undivided interest in the mortgage money, and all the mortgagees had been in possession as above, and one only gives the acknowledgment, what effect, if any, has this on the other mortgagees? Give reasons for your answer.

8. A, having an insurance on his life, makes a voluntary assignment of the policy to B in trust to collect the insurance money on A's death, and apply the same for the benefit of A's children, no notice of the assignment having been given to the insurance company. A subsequently surrenders the policy to the company, and receives its surrender value. A never delivered the policy to B, and now claims to be entitled to retain the money got from the insurance company, on the ground that the assignment being without consideration, and that A had never delivered the policy to B, the assignment was not perfect, and that A could not have been compelled to perfect it. Give your

opinion as to the soundness of A's contention.

9. Give an exception to the general rule that "a purchaser of personality from an executor is not bound to see to the application of the purchase money."

10. A testator by his will gives a sum of money for the erection of a church on a named lot. After his death it is found that by reason of the Statutes of Mortmain, the money cannot be legally applied in aid of the particular charity mentioned in the will. What becomes of this legacy? Explain.

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*Leake on Contracts.*

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1. Classify "Contracts implied by law."

2. In what cases is a party at liberty to shew that the agreement was understood by him in a manner consistent with its terms, but different from the application accepted by the other party?

3. Give Blackstone's definition of "Quantum meruit," and "Quantum valebat."

4. What is meant by "a common mistake of a matter of law," and "a common mistake upon a matter of fact"?

5. In what cases will a set-off not be allowed in an action on a contract?

6. What is a *chose in action*? and in what respect, and from what years, has the law in Ontario been altered (1) respecting the *chooses in action* of married women; and (2) respecting assignees of *chooses in action*?

7. Give exceptions to the rule which requires the common seal to contracts by corporations.

8. What is the effect upon a written instrument of an alteration (1) by one party without the consent of the other, and (2) by a stranger?

9. What is "an executory consideration"?

10. Give an outline of the provisions of the 4th and 17th sections of the Statute of Frauds.

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CONVEYANCING MADE EASY.

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We commend to our young friends the following cleverly rhymed, as well as accurate paraphrase of a statutory deed, sent to us by an occasional correspondent. He styles it,

## LAW STUDENTS' DEPARTMENT—CONVEYANCING MADE EASY.—CORRESPONDENCE.

## "A DEED WITHOUT AN AIM."\*

Know all men by these presents, and do ye remember,  
 This Indenture, made (say on some day in December),  
 One thousand eight hundred and seventy (dash)—  
 (Better not let the date and delivery clash);  
 By force and by virtue of Con. Stat. U. C.,  
 Chapter—(look in the Statutes and there you will see);  
 Between John Smith of (blank) in the county of (blank),  
 (Setting forth where he lives, and his calling or rank),  
 And Susan, his wife (of her free will and power),  
 Who joins for the purpose of barring her dower;  
 He, of the first part, of the second part, she;  
 And lastly, John Brown, of the third part, grantee,  
 Doth witness that, for and in consideration  
 Of (the sum hereinsert) lawful coin of our nation,  
 Which he hereby acknowledges he doth receive  
 As an adequate price for his lands, you perceive,  
 To John Smith, of the first part, as mentioned before,  
 Doth grant, convey, transfer, assign, and set over  
 All and singular those certain parcels or tracts  
 Of land (here describe them according to facts),  
 To John Brown aforesaid, his heirs and assigns,  
 With their easements, ways, waters, their woods  
 and their mines;  
 Their profits, appurtenances, also their rents,  
 And in fact all that's meant by "hereditaments;"  
*Habendum, tuendum*, which means, as you see,  
 To have and to hold unto Brown, the grantee,  
 To his use and behoof, and to that of none others,  
 His heirs and assigns, and his sisters and brothers,  
 His aunts and his uncles, and also his cousins,  
 And children, although he may have them by dozens;  
 And Smith, of the first part, the covenantor,  
 Whose name you observe has been mentioned before,  
 Doth covenant, promise, and also agree  
 With John Brown, aforesaid, the covenantee,  
 That he hath the right to convey the said land,  
 Notwithstanding aught done by him touching it,  
 and  
 The said Smith and his heirs also make this concession,  
 That Brown and his heirs shall have quiet possession  
 Of all that the hereinbefore described land,  
 And that free and clear of all kinds of demand,  
 Gift, grant, bargain, sale, jointure, dower, and rent,

Entail, statute, trust, execution, extent,  
 Done, suffered, permitted, or otherwise made  
 By Smith or his heirs on the land now conveyed;  
 And, that Brown's estate may have the better  
 endurance,  
 Smith hereby agrees that such further assurance  
 As Brown or his heirs may in reason request,  
 And in counsel's opinion may seem to be best,  
 He will execute; so that there may be no flaw  
 To subject Brown aforesaid to process of law;  
 Nor hath he done aught whose effect e'er will be  
 To incumber said lands in the slightest degree—  
 That his rights to the said lands may certainly  
 cease,  
 Smith doth by these presents remise and release  
 All his interest, title, estate, right and claim  
 Of, in, to, from, out of, and touching the same  
 To him of the third part, *videlicet*, Brown,  
 And those claiming under him all the way down;  
 And Susan, in case she should outlive her spouse,  
 And should thereupon claim what the law her  
 allows,  
 Doth hereby release all her claims and demands,  
 Right and title, to dower in or to the said lands.  
 In witness whereof, all the parties aforesaid,  
 Have hereunto set their hands and their seals,  
 and—no more said.

Signed, sealed and delivered in presence of me :  
 (Let the witness sign here, whosoever he be.)

## CORRESPONDENCE.

*Fusion of Law and Equity.*

TO THE EDITOR OF THE LAW JOURNAL :

SIR,—“What we want, and at this late day, at all events, have a right to expect, is one really good Act, which will settle everything for years to come, or at least put everything in the proper course to accomplish that result.” So speaks Q. C., in his letter to your *Journal* for November last.

Most assuredly we want it. Just think of it,—“settle everything for years to come,”—grand, but oh! why not for ever? “Have a right to expect”? Well, perhaps we have suffered long enough, but then what good thing “in this late day”

\* *Shakespeare*—a little altered.



## CORRESPONDENCE.

have we done that entitles us to it? Are we any better than our fathers? If not, why before "this late day," was there no reason to anticipate the early approach of a legal millenium. However, admitting that we have an indisputable "right to expect" everything to be put straight "for years to come," who are we going to get to do it? Mr. Mowat could, but he won't. Mr. Macdougall evidently is not the man, for he will not admit as "the fact is, that such English Act has not accomplished all it aimed at." Who then? The qualifications required are great. Who can we get? His information must be extensive; his familiarity with the present systems, and particularly its abuses, large; his powers of conception and execution ingenious and bold. Have we a man equal to the task? I am not prepared, sir, to admit that we have not. Let me mention some of the qualifications which are possessed by one of our own profession, a gentleman who, for the present, shall be nameless, but who, at all events, is a Q. C. He is, sir, a man who thinks he has "*fairly, thoroughly and impartially*," in your pages, discussed the subject; a man who would rise superior to all the interests which would gather together for the purpose of defeating the realization of the scheme; a man who would not be retarded by any false sympathy with "those who know nothing but mere chancery law, who practice nowhere else than in the Chancery Court, and who feel in themselves that they have not the capacity of learning what would enable them to hold their own if the change occurred; whose occupation would be gone if such an Act were passed." A man who has studied the working of the English Act and can tell you exactly why it did not give satisfaction—because the greatest lawyers and statesmen in England made "a blunder as glaring as

if they had enacted that from and after a given day, every ordinary old half-inch auger, every time it was used for boring, should make a two inch auger hole instead of, as heretofore, only a half-inch auger hole," (the blunder being that the English Legislature contented itself with enacting fusion of the Courts, and did not supply "them with any new and more comprehensive system of practice or procedure"—a very large blunder somewhere certainly, for, as a matter of fact, the English Legislature did supply one hundred and eighteen statutory pages of new practice for the fused Courts (see 38, 39 Vict. c. 77, pp. 778 to 896, and authorised the Judges to add to it); and above all, sir, a man who has perfect faith in the scheme, who sees clearly that as soon as it is accomplished "all will immediately be settled, and become certain and intelligible,"—Heaven bless him! But after all might he not fail; has he really mastered all the details, and foreseen and provided against all difficulties? Why, yes! Listen! First, change the names of the Courts so that the Judges won't know whether they are Chancery or Common Law Judges. For fear that any of them might find out, sort them up, so that every Chancery Judge will be between two Common Law Judges, and every Common Law Judge have equity on both sides of him. "This would fix in the minds of the Judges that their respective Courts no longer differ from one another in any respect." Secondly, "we must thoroughly fuse" the Courts, "by making all our Superior Courts, both Courts of Law and courts of equity to all intents and purposes." This can "be accomplished at one stroke, by simply passing some statute,"—no difficulty upon that score. "Thirdly, *the Judges should devise a new practice and procedure which should apply always until changed.*"

## CORRESPONDENCE.

You see, sir, it is quite simple,—by Act of Parliament *the Judges* are to be ordered to create a new practice. But after all, supposing that the creative principle is not sufficiently strong in the breasts of the unfortunate Judges. What then? Or supposing that the Chancery Judges were possessed of the absurd notion that their present practice was really an excellent one, and refused to have it abolished, to make way for the system in which a majority of the Judges had faith—what then? I am afraid, sir, that the only “devising” that the Judges would accomplish would be by their last wills and testaments, the greater part of which would undoubtedly reveal the impress of minds harassed, worn and prematurely decayed by years of hopeless effort to eradicate from other minds the ineradicable result of a lifelong devotion to one or other system of practice.

Would it not be better, sir, if we are “fairly, thoroughly and impartially” to discuss this subject, to abandon “sweeping statements as to Chancery practitioners,” and their system of practice, and to endeavour, by a comparison of the two systems, to arrive at some settled notion of what the new practice should be. I make no charges, at present, against the Common Law system, but will be glad, sir, you holding the equal scales of the tournament, to be the champion of the Chancery system of procedure, and on a scrutiny of abuses and anomalies, to defend and attack in turn.

Yours, &c.,  
HUMBLE STUFF.

TO THE EDITOR OF THE LAW JOURNAL.

DEAR SIR,—The letter in your November number, by “Q. C.,” touching the question of fusion of law and

equity, presents many mistaken views on the part of the writer. Why should he assume that those members of the profession who are accustomed to practise in the Court of Chancery are the stout opponents, not only of a proper measure for bringing about Fusion, but of the very principle itself; or why should he arrogate to himself the right to speak of them in the manner he does in his letter? The assertions he makes as to the practice and procedure of the Court of Chancery are not warranted by the facts, and he forgets the history of the Common Law pleading and practice, of which he would fain be the champion. It is not so long since special demurrers and various other iniquities of practice and procedure, now abolished, gave field and scope to the subtle ingenuity of gentlemen of the Common Law Bar.

For generations, if not for centuries, the Courts of Common Law and their procedure have been undergoing a process of pruning and amelioration, till they have attained their present state and practice. In this connection we may note the Statute 4 W. IV. (which abolished a long list of proceedings, to find out the meaning and object of which would require a considerable amount of study), and the Common Law Procedure Act, which wrought a vast change in the whole Common Law procedure. All these reforms were needed, but even “Q. C.” will not deny that there is yet great room for much amelioration in the same quarter.

It is fair to say that all the Courts have, as far as possible, kept pace with the times, yet the blessings which we now enjoy, in a somewhat reasonable system of procedure and practice at law is due in no small measure to the pressure of the more liberal and enlightend jurisprudence and procedure administered in the

## CORRESPONDENCE.

Court of Chancery in England and here. In fact, all the liberal ideas for which Common Law men are glad to take credit, have from time to time taken their rise from the Equity Court.

In the Court of Chancery in this Province, since the Honourable W. H. Blake became Chancellor, about ten years after its institution, reforms have been effected, where necessary, of quite as beneficial a character as those effected at law, but the same amount of arbitrary and unreasonable practice never obtained in the Court of Equity, during recent generations, as has been abolished by legislation of comparatively recent date at law.

To any one who is acquainted with its jurisdiction and practice, the suggestion of abolishing the Court of Chancery appears puerile indeed. Let us examine some of the reasons for this position as briefly as possible. It is a common mistake, not only with the laity but even with members of the profession, confining themselves to the Common Law system, to suppose that the business of the Court of Chancery is all, or nearly all, of the same nature, and capable of the same procedure as that of the Common Law Courts, as such. Now, more than half of the business of the Court of Chancery, it is well known, may be described as "administrative business;" familiar instances of this are the common proceedings for administration of testators' and intestates' estates; Suits for accounts of partnerships; suits and proceedings for winding up corporations and insurance companies, &c. These matters constitute the chief business in the offices of the masters, and in every such proceeding, the master is required to unravel, in a limited time, what the parties themselves have been wholly unable to do without his aid. Many administration and partnership suits which have come under my own cognizance, have been dis-

posed of by the report of the master in a few months, when complicated transactions of a decade or two, or more, involving often hundreds of thousands of dollars, had to be investigated, sifted and adjusted; no other tribunal could have brought about the result as expeditiously and well. Then the Court, in its administrative jurisdiction, and its jurisdiction over trusts, becomes the controller of a very large number of estates and funds, which the parties very gladly put under the safe guidance of the Court, to guard the interests of those too young, or from some other cause, unable to look after their own interests.

In administering these estates and funds, applications to the Court are from time to time, of course, necessary.

The laity, and those who do not understand, or do not wish to understand, the practice and jurisdiction of the Court, are pleased to regard the suit or proceeding, in respect of which the estate or fund came under the control of the Court as existing till the fund is paid out, and to cry out about delays; while the fact is that all the matters in which it was necessary to exercise the judicial function were disposed of in as short a time as anybody could wish, and the fund has remained in the Court merely awaiting the coming of age of the beneficiary or the happening of the event provided for under settlement or condition by which the estate or fund is bound. As to that part of the jurisdiction not administrative, it may be briefly comprehended under the head "litigious," and it is a matter of notoriety to all acquainted with the Court that this part of the jurisdiction is exercised as expeditiously and certainly, with just as much convenience to everybody, as the business requiring the same treatment is in any other Court. There is this great differ-

## CORRESPONDENCE.

ence in favour of the Court of Chancery, that suitors are spared all the by-play of formal verdicts and motions in term which Common Law gentlemen are so well accustomed to, and so fond of.

For years the practice of the Court of Chancery has been so framed as to allow as little opportunity for delay in any part of its practice as possible. The greatest facility is afforded to the opposite side, always to assume the conduct of the proceedings, or have them summarily dismissed in the event of unnecessary delay. Each suitor has the matter of delay or no delay completely in his own hands. Without enlarging further, it must be plain that the jurisdiction thus exercised must always be existent in some tribunal, and perhaps "Q. C." would be satisfied if the name of the Court alone was changed. Since the passage of the Administration of Justice Act, 1873, it has been possible to bring in the shape of suits in the Court of Chancery many matters exclusively cognizable in Courts of law, and *vice versa*. I would refer "Q. C." to the officers of the different Courts as to what the result has been. He will find that the business of the Court of Chancery has increased enormously; a pretty fair evidence of the favour in which that Court is held by those acquainted with its jurisdiction, practice, and procedure.

When a fusion of law and equity, such as that proposed by "A City Solicitor," in the letter referred to by "Q. C.," is contemplated, one of the chief considerations is the best form of pleadings to be adopted. Once concede as the guiding principle that, in any case, full justice is to be done between the parties to the litigation, then the principle of equity pleading by statement and counter-statement ought certainly to recommend itself as the simplest way by which the Court can be informed of the different matters which its decree should reach

and dispose of. The well-known difference between an equity decree and a judgment at law renders it impossible that matters disposed of by the first could be disposed of by the other, so as to do complete justice between the parties. I venture to say that in all cases where, owing to the Common Law pleadings, a Common Law judgment must follow, a comprehensive decree, dealing with all the rights involved, would be a much more effectual means of arriving at complete justice between the parties. It would be a great favour, I am sure, to the authorities of the Court of Chancery if "Q. C." would be more explicit, and point out the particulars in which the practice and procedure of the Court of Chancery is not in accordance with modern ideas, and also particularize the unnecessary delays, complications, technical obstructions to justice, and a host of petty expenses impossible to be got rid of, of which he complains. Of course, if it is assumed that the Court is in a wilfully purblind state, it will cherish these abuses to the end of time, unless they are clearly pointed out and exposed. "Q. C." claims to be one of the few who knows of their existence; let him come forward and candidly state them.

It would be well if, at the same time, he would explain why the Courts of Common Law have had to borrow, from time to time, many of those antiquated forms of procedure and practice of the Court of Chancery, which "Q. C." inveighs against. Let him tell us where the Common Law injunction, the production of documents at Common Law, the cross-examination of parties after issue joined, came from; and why Common Law Courts found it necessary to adopt these matters of procedure.

It is well known that you cannot cross-examine parties on affidavits made to support applications to Chambers or to

## CORRESPONDENCE—REVIEWS.

Court, at law, as a matter of course, and that great injustice often results. Such examinations are had, as a matter of course, in Chancery. Pleadings in Chancery can be amended without costly applications, if done within reasonable time. None of the many frivolous and expensive applications, as to forms of pleadings, which are necessary at law are necessary in Chancery. There is a weekly court in Chancery for the decision of all cases not requiring to be set down for trial on oral testimony, (in addition to the Court for motions and interlocutory applications); there is no such Court at Law. Let fusion take place at once, only do not let men of narrow mind, and with narrow prejudices, be the framers of the new system. "Q. C." evidently desires this fusion; the only thing he has to fear is that it may take place in his time.

Fusion of law and equity in the Province, looked upon as a means of arriving, as nearly as possible, at full justice, must, I humbly submit, result in the wholesale application of the pleadings, practice, and procedure of the Court of Chancery in all the Courts of Common Law. I fear "Q. C.'s" complaint about the labour of having two systems is sincere, and that his apparent total ignorance of the jurisdiction and practice of the Court of Equity, and opinions of equity practitioners, would entail a serious amount of self-education, did he continue to practise after this fusion took place. He will not be alone, however. It may be that the Legislature will find it a serious obstacle, in their efforts at fusion, to provide for a good many Common Law practitioners who have confined themselves to the Common Law system as exclusively as it would seem "Q. C." has done.

I have the honour to be,

Yours, &c.,

EQUITY.

## REVIEWS.

**FORENSIC MEDICINE AND TOXICOLOGY.**  
By W. Bathurst Woodman, M.D., F.R.C.P., and Charles Meymott Tidy, M.B., F.C.S., with plates and illustrations. Philadelphia: Lindsay & Blakiston. Toronto: Copp Clark & Co. 1877.

This is a very learned work by two eminent men, connected with the London Hospital, &c. The information it contains will be found of great use to the criminal lawyer, as a work of reference, when the occasion may require. It is especially intended, however, or at least will be especially valuable to the medical expert. The preface claims it to be "simply a comprehensive Medico-legal Handy-book. Although its subject is legal medicine, it deals with the medical rather than with the legal. The authors have felt that lawyers know the legal aspect of the subject better than physicians, whilst physicians know the medical better than lawyers. Recognizing, however, the existence of a part of the subject belonging to both lawyer and physician, but special to neither, they have ventured on this mid-territory, trusting that their medical view of the land in question may be found of service to those whose profession leads them to regard it primarily from a different point of view."

We are not competent to express an opinion of any value as to this book, so far as the medical part of it is concerned, but the arrangement seems admirably adapted to give the matter as handily as possible to the enquirer. The amount of information given is enormous and of a very varied kind, and we could not here give an idea of the multitude of matters discussed. It is impossible for medical men to write a book which will be at all perfect as a treatise on medical jurisprudence. They look at things from an entirely different standpoint, and we agree with a suggestion that we have seen, that a work of this kind should be the joint production of a physician and a lawyer. The subjects treated of are largely illustrated by coloured plates. Whilst it is quite possible for a lawyer to do without this book, no

## REVIEWS—RULE OF COURT—FLOTSAM AND JETSAM.

good library would be complete without it, and we commend it to all who can afford it.

BLACKWOOD, for December. The Leonard Scott Publishing Co., 41 Barclay Street, New York.

This is the last number of a year during which period the Magazine seems to have recovered the energy and vivacity of its early days. The following are the contents of this number :

1. The Tender Recollections of Irene Macgillicuddy, Part I ; 2. Pelasgic Mykenæ ; 3. Mine is thine, Part VI. ; 4. The Opium Eater ; 5. The Widow's Cloak ; 6. The Parliamentary Recess ; 7. Poems. By J. R. S. ; 8. The Storm in the East. No. VII.

The periodicals reprinted by "The Leonard Scott Publishing Co." (41 Barclay Street, N.Y.) are as follows : *The London Quarterly*, *Edinburgh, Westminster*, and *British Quarterly Reviews*, and *Blackwood's Magazine*. Price, \$4 a year for any one, or only \$15 for all, and the postage is prepaid by the Publishers.

We strongly advise our readers to send in their subscriptions at once. They will get more valuable information and instructive reading matter for the money expended, from these publications than in any other way.

The following Rule of the Court of Queen's Bench and Common Pleas of Easter Term last does not seem to have been heretofore published :—

"Leave shall not be given to demur and traverse the same pleading unless an affidavit distinctly denying some one or more material statement or statements in such. and unless in exceptional cases, in the discretion of the Court or Judge, affidavits merely as to the belief of the existence of just grounds of traverse shall not be sufficient."

## FLOTSAM AND JETSAM.

The manner in which a great proportion of our laws came into being is well illustrated in an essay read by Prof. Barbeck, of Cambridge, England, before the Antwerp congress. He said, "An attention to the history of law will, I think, further show that laws were established before penalties were invented for enforcing them, and that a penalty was exacted, because a law had been broken, as a consequence of a breach of the law ; not, originally at least, as a part of the law itself. Take, for example, the rule of the road, I believe no trace of the existence of such a rule a hundred years ago can be found. It originated in no command of a political superior, nor in any command at all. About fifty years ago, if I remember rightly, the existence of the rule was denied by Lord Abinger, when Chief Baron of the Exchequer. It gathered strength because convenience demanded that there should be such a rule when thoroughfares became crowded. The rule required two carriages meeting each other to keep their left side of the road. And the rule became at length so well known in England, and so generally observed, that when an accident occurred in consequence of a carriage taking the right hand instead of the left, the owner of that carriage was held liable to make good any damage done to the other. The judge who first gave this decision did not make the law. He gave the decision because he found the law already made—made by general, though tacit, consent. The judge merely recognised and declared the law. If he had not found it existing, he would have refused to act upon such a rule, as was the case with Lord Abinger. There are, moreover, many legal maxims, the observance of which depends on no penalty which can properly be said to be attached to the breach of them, but on the voluntary observance of them by those intrusted with the administration of the law. As for example, that an assignee generally takes no better title than his assignor : that a married woman cannot contract so as to render her

## FLOTSAM AND JETSAM.

self personally liable; and almost innumerable other general rules of the highest importance."—*Albany Law Journal*.

The London *Standard* thus speaks of the bar in Russia: "The bar is to this day far behind in its standard of professional honour and dignity. A system obtains of bargaining direct with the client on the 'payment by results' principle. In criminal cases the prisoner will agree to pay his counsel three or four times as much if he secures him an acquittal, and the counsel takes good care to get a large part of this money in advance. A barrister will even descend to frightening his client by exaggerated statements of the danger he is in; and, further, will not scruple to demand, also in advance, payments for 'secret purposes'—that is, for bribing influential officials. Indeed, the bar in Russia is mercenary and rapacious; and as the division of duties recognised in England between the solicitor and the barrister is not known in Russia, sharp counsel are brought face to face with their unhappy clients, and take the measure of their means and ignorant credulity. The barrister regulates his fees in much the same way as an advertising quack doctor would do, and carries on the action or cure in the lowest commercial spirit."—*Albany Law Journal*.

**MR. THESIGER.**—The Hon. Alfred Henry Thesiger, who has been appointed a judge of the Court of Appeal in the place of Lord Justice Amphlett, is the youngest son of Lord Chelmsford, and was born in 1838. Mr. Thesiger was educated at Eton and at Christ Church, but was not distinguished for classical ability either at school or at college. He was called on June 11, 1862, and was a member of the Home and South-Eastern Circuits. He quickly acquired a large practice at the bar, and was created a Queen's Counsel in 1873. Since he took "silk," his business has increased with great rapidity; and very few men could shew a heavier fee-book. The learned

gentleman was justly celebrated for his legal arguments. Before juries he was not very successful, his style being heavy, and his speeches being destitute of the ornaments of wit and eloquence. His industry was proverbial; and he never came into Court without having read his brief. No one at the bar enjoyed a higher reputation for honourable conduct in professional life. It is very gratifying to think that Lord Chelmsford, the most popular man with both branches of the profession ever known, has lived to see his son attain to so high a position at such an early age.—*Law Journal*.

Judges might be relieved of much unnecessary labour by the use of certain aids which, though not heretofore adopted here, are practicable and proper. The greater part of the labour connected with the determination of a case consists in (1) the collocation of the authorities bearing upon the issues involved in it, and (2) the writing out of the results of such collocation. In other words, looking up cases, and writing opinions, constitute a considerable part of the judicial work. Now the case law bearing upon the points argued in any cause could be looked up and arranged by any good lawyer, so that all the judge or court would have to do would be to apply the same. This could be done in an opinion delivered orally, and written down by a stenographer. A practice something like this, we understand, prevails, to some extent, in England. The magistrates have clerks who prepare the argued cases for decision, and the opinion, when one is given, is delivered *via voce*. Such a plan might at first work awkwardly, but we are confident that once fairly tried, there would be no return to the one now in vogue. Not only would the judges be relieved of much drudgery, but they could dispose of business much more rapidly, and thus more nearly accomplish the duties which are imposed upon them. It is at least worth while to make a trial of the system suggested. That now in use certainly is not the proper one.—*Albany Law Journal*.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR FEBRUARY.

1. Fri...Examinations for call. Last day for collector to return roll.
2. Sat...Examinations for call with honors.
4. Mon...Hilary Term begins. Law Society Convocation meets.
5. Tues...Law Society Convocation meets.
6. Wed...Hagarty, C. J., sworn in as C. J. of C. P., 1856.
9. Sat...Law Society Convocation meets.
10. Sun...Queen Victoria married, 1840.
15. Fri...Law Society Convocation meets. Last day for Assessors to begin to make their rolls.
18. Mon...Last day for moving against Municipal elections.
21. Thur...Rehearing term in Chancery begins.
24. Sun...St. Matthias.
27. Wed...Sir J. Colborne, Administrator, 1838.

## CONTENTS.

EDITORIALS :	PAGE
Irish Law Reports .....	42
Official Assignees .....	42
Our Appellate Courts .....	42
Rights of Counsel .....	43
Dissenting Judgments .....	43
Furnished Apartments .....	45

SELECTIONS :	PAGE
Interest upon Interest .....	50
Judges by Descent .....	54

ONTARIO REPORTS :	PAGE
COMMON LAW CHAMBERS.	
Mitchell v. Mulholland.	
Prohibition—Division Courts—New trial ...	55

QUEBEC REPORTS :	PAGE
QUEBEC'S BENCH, APPEAL SIDE.	
Angers v. The Queen Insurance Co.	
Powers of Local Legislatures—Stamp duty on Insurance Policies—Quebec Statute, 39 Viet. c. 7.....	55

NOTES OF CASES :	PAGE
Court of Appeal .....	56
Queen's Bench .....	60
Common Pleas .....	60

ENGLISH REPORTS :	PAGE
Digest of the English Law Reports for February, March, and April, 1877 .....	61

LAW STUDENTS' DEPARTMENT :	PAGE
Examination questions .....	68
Correspondence .....	68

REVIEWS .....	PAGE
	68

## Canada Law Journal.

Toronto, February, 1878.

We are glad to see that our efforts to increase the usefulness and interest of this Journal are being appreciated. In fact, it has come to this, and is generally recognized, as far as Ontario is concerned, that no practising lawyer with any pretensions to business, and no student with any ambition, can afford to be without it. And, as the decisions of our Courts are looked upon as high authority, not only in the other Provinces of the Dominion, but also in the United States, and are not unfrequently referred to in England, the "Notes of Cases," giving, as they do, all the decisions of our Superior Courts, will be of great value to professional men in those places. Our Sheet Almanac for 1878 is increased in size and information. The index for last volume is issued with this number. We regret that owing to printers' delays it is not already in the hands of our readers. The *Résumé* of proceedings of the Law Society for Michaelmas Term last was not received in time for insertion in this number.

We are pleased to see our sketch of the life of the late lamented Chief-Justice Draper copied in full in the *English Law Journal*. It is well that the many excellent qualities of that eminent judge should be better known than they could be through our pages. It would, however, have been more courteous to us, and have added to the information of the readers of our namesake, if the usual acknowledgment of the authorship of the article had been given. It was doubtless an oversight, but if our positions had been reversed, it is probable



## EDITORIAL ITEMS.

that our contemporary would have had something to say about it.

The Council of Law Reporting in Ireland have communicated with Lord Justice Christian, and have asked him to assist in the preparation of his judgments by giving his manuscript, or by correcting the short-hand writer's transcript of his notes. To this he has replied in effect: "Do not report me at all." This, of course, cannot be, and the Council will have to go on as heretofore, despite the animosity of the irate judge.

A curious question has recently been raised as to the right of official assignees to office room in the court-houses of the different counties. Section 359 of the Municipal Act enacts that County Councils shall "provide all necessary and proper accommodation, fuel, &c., for all Courts of Justice, other than the Division Court, and for all officers connected with such Courts." The Insolvent Act makes (sec. 28, b.) every official assignee an officer of the Court having jurisdiction in the county for which he is appointed, and subject to the summary jurisdiction of the Court or a Judge thereof. An enterprising assignee who thinks that his down-trodden class should have some of the good things that are going, and which have been so far denied them by a grasping and over-reaching public, has made a demand upon a County Council for an office, fuel, light, &c., in the court-house of his county. The question is not free from doubt; and, as the squabble is a very pretty one, we shall not try to spoil it by offering any opinion on the subject. We only remark that if all the County Councils are as mean in their economies as is that of the county in which we now write, and if all court-houses are as dirty and uncon-

fortable as that of the County of York, there is no fear of any official assignee claiming a right to encamp in the musty den that disgraces the metropolis of Ontario.

The idea of a quite satisfactory adjustment of disputes by any system of law has long been abandoned, even if any hopeful party ever dreamed of such an impossible, though much longed for, desideratum. It is, therefore, merely an incident, that we note the present result of the litigation in *Samo et al. v. The Gore District Insurance Company*, reported in a recent number of the Appeal reports. The defendants had judgment in their favour by the unanimous decision of the Court of Common Pleas. When the case came up on appeal, this opinion was, on the main point, sustained by the Chief Justice of Ontario, but reversed by three Judges of the Court of Appeal. In fact, Patterson, Burton, and Moss, J.J.A., over-ruled Hagarty, C.J., Harrison, C.J., Gwynne, J. and Galt, J. As far as the facts of the suit were concerned, the case seemed a hard one on the plaintiffs, and the Court of Appeal may be right; the result, however, cannot be said to be very satisfactory in its legal aspect. The case, we understand, goes to the Supreme Court. In the last number of the reports of that Court, (of which more hereafter) is published the case of *Johnston v. St. Andrews Church*, on an appeal from the Court of Queen's Bench for Quebec. The first decision in the Superior Court was in favour of the defendants. The plaintiff appealed to the Queen's Bench, and that tribunal by a majority of one out of five judges, dismissed the appeal. The Supreme Court reversed this decision, the Chief Justice and Strong, J. dissenting. That is to say, of the twelve judges who at va-

## RIGHTS OF COUNSEL—DISSENTING JUDGMENTS.

rious times gave judgment, six were in favour of the plaintiff, and six were for the defendants.

## RIGHTS OF COUNSEL.

A question involving the rights of counsel has lately come up in England, and has been ruled or advised upon by the judge at Nisi Prius. In an interpleader suit "an eminent serjeant" was retained for the plaintiff. When the case came on for trial, a brief was not given to the serjeant, but to another counsel. The serjeant thereupon dropped a note to the other counsel, informing him of the retainer, and insisting on his right to a brief. Upon reference to the judge presiding, he thought that the retainer should be followed by a brief, and adjourned the case so that an arrangement might be effected. The *Solicitors' Journal* puts it properly and forcibly thus: that the special retainer at the beginning of a suit is to be considered as equivalent to a pledge to deliver a brief in due course, if the case goes to trial.

In *Reg. v. Wilkinson, re Brown*, 41 U. C. R., 70, it is said that certain gentlemen appeared as counsel for Mr. Brown, but that he shewed cause in person. It appears not to be settled whether if a party appears in person he may be assisted in the discussion of legal points by counsel. In *Shuttleworth v. Nicholson*, 1 Moo. & R., 255, Tindal, C. J., allowed counsel to argue that there was no case for the jury against the defendant in person, but not to cross-examine. But much more reasonable is the view of Alderson, J. in *Mercati v. Lawson*, 7 C. & P., 39, where he said that counsel ought to appear as such, or not at all, and he further remarked that if every case were conducted by the party himself, no strength could get through the business. We understand that in the *Wilkinson*

case the Court required the litigant shewing cause to elect whether he or his counsel would argue the case, and declined to sanction any division of labour.

## DISSENTING JUDGMENTS.

In the Privy Council the practice has been pursued from ancient times of promulgating only the judgment of the majority of the members in cases where there was a difference of opinion among the Councillors. The Order of February 1627, provides that "when the business is to be carried according to the most voices, no publication is afterwards to be made by any man, how the particular voices and opinions went." When the Judicial Committee of the Privy Council was constituted by the Act of 1833, it was enacted that appeal causes and matters "shall be heard and a report made to His Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the Privy Council." And so it happens that reasons for the judgments of the Privy Council are delivered by one Judge, who speaks for and in the name of all. There is a different practice in the House of Lords, where each peer, can, if he pleases, enunciate his own views, and agree with or dissent from those of the others. The dissentient judgments in appeals to the Lords thus come to be reported—not so with regard to appeals to the Privy Council. In this Province it has always been usual for the members of the Court of Appeal to deliver separate judgments and dissentient judgments of the minority receive equal consideration at the hands of the reporter, with those of the majority who agree as to the result of the appeal. We perceive from the published numbers of the Reports of the Supreme Court of the

## DISSENTING JUDGMENTS.

Dominion, that dissentient judgments are pronounced and are reported in *extenso*. It is because we think the adoption of such a practice of very questionable advantage that we now draw attention to this subject.

In the Supreme Court of the United States, it is not the custom to report any opinion given by the dissenting judges. The fact that such and such a judge dissents is mentioned and no more. In many of the separate States the same practice obtains as to the decisions of the Supreme Court of the particular State. The opinion of the Court is prepared and pronounced by one judge, appointed in conference by the others, and this limitation has a great influence on the care and precision with which the judgment of the Court is formulated. The principle underlying the whole matter is, as a contemporary expresses it, that a final tribunal should give forth no uncertain sound as to the law, and the publication of conflicting judgments can only tend to weaken the authority of the rule laid down, and so to perpetuate uncertainty and to increase litigation.

It is evident that one good end which would result from the suppression of dissentient opinions would be the reduction in bulk to that extent of the yearly volumes of the Reports. A very much over-ruled judge might then imitate the example of the Pennsylvania justice, who published at his own charges, in a volume by themselves, his own dissenting judgments, and so sought redress at the hands of posterity. It is further evident that if the reporters do their duty, and give a proper synopsis of the arguments of the opposing counsel, it is unnecessary to set forth the grounds of dissent on the part of any of the judges. Any attentive student of the case will see where doubts may arise. But when a judge has fully

combated his brethren in the conference room, and been voted down, it is better that his reasons for withholding assent, should not be reported, so as to cast disrespect on the considered judgment of Courts of last resort. We think we speak advisedly when we say that the little weight possessed by decisions of Lower Canada Courts is partly owing to the diverse views entertained and expressed by the different judges who take part in the disposition of the case. Much better to suppress the disagreement and not to give prominence to it by publishing in *extenso* all that can be said against the opinion of the majority. As in family matters, if there be disturbances, better not aggravate the trouble by taking the public into your confidence. When Mr. Justice Maule, according to the well-known story, gave judgment, after Judge A, and Judge B, had just delivered conflicting opinions, by saying that he agreed with his brother B, for the reasons given by his brother A, he never intended that the views of the Court should be published for the benefit of the profession, or the confusion of suitors.

The object of all decisions is to settle the law—to determine the just rule fitted to the existing state of things, and it is most important that the conclusion should be reached with such precision and unanimity, as not to provoke litigation. In the Court of final appeal for this Dominion, we think that the ancient customs of the Privy Council, and the well-considered practice of the Supreme Court of the United States, may well be recognised and adopted. The opinion of the Court should be composed and delivered by one member and no dissenting judgment should be pronounced or reported. When Chief-Justice Marshall presided in the Supreme Court, one finds the formula adopted in pronouncing the opinion of the Court thus, as in

## DISSENTING JUDGMENTS—FURNISHED APARTMENTS.

Cranch's Reports: "The majority of the Court is of the opinion, &c." "The Court, with the exception of two judges, have come to the conclusion," &c. Dissent, which implies discord, was not allowed to mar the influence of the Court. Prominence was not given to the various opinions of the members of the Court, but emphasis was laid upon the judgment of the Court. The decision was given and the reasons for it, but not the reasons against it, and even the names of the dissentient judges were suppressed. By such a course, we are persuaded that the Court at Ottawa will gain in strength and dignity, and secure the respect and confidence of inferior tribunals.

## FURNISHED APARTMENTS.

"I don't see that law rubbish is worse than any other sort. It is not so bad as the rubbishy literature that people choke their minds with. It doesn't make one so dull." This sapient remark of Mr. Rex Gascoigne (one of George Eliot's latest friends) is the excuse for the appearance, at this season of rubbishy magazine articles, of this *olla podrida* of cases.

Many a young bachelor, and many a young *feme sole*, is just now contemplating the advisability of taking a furnished house, or, at the least, furnished apartments. To such young people we would extend the following words of advice, warning and information, based upon the experience of bygone days.

Imprimis: to avoid all possibility of future disputations with the owner of the furnished lodgings or house (as the contract concerning them is one concerning an interest in lands, within the purview of the Statute of Frauds) it is well to follow Mr. Woodfall's advice, and have the agreement reduced to black and

white. In it should be specified the amount of rent, the time of entry, the length of notice to quit required and any other necessary particulars; and do not neglect to have affixed a list of the goods and chattels in the apartments (Woodfall, Landlord and Tenant, 8th Ed., 173).

'Tis well to see that the taxes and the rent (unless the landlord owns the house) are paid up and are likely to be kept so, for one's own personal belongings will be liable for his rent and taxes; unless, indeed, the local habitation chance to be in New England, New York, or some one of the other States of the Union where the power of distress no longer exists (Parsons on Contracts, vol. ii., 517). Of course a man does not take much with him except his books, but his wife takes her clothes, her cat and her bird, and none of these are exempt from a landlord's warrant. Wearing apparel cannot be seized for debt, but it can be for rent, unless in actual use. Mr. Baynes helped to decide this point. In 1794 he was eight weeks in arrear for his furnished lodgings, so a bailiff appeared on the boards, and took his raiment and that of Mrs. B., although part of it was actually in the wash-tub at the time, and Lord Kenyon, before whom the matter came, said that it was all right (*Baynes v. Smith*, 1 Esp., 206). The same judge, in another case, decided that a landlord could take the clothes belonging to a man's wife and children, while they, the clothes screens (as Carlyle calls them), not the clothes, were in bed, and which the bipeds—thus left naked—were in the daily habit of wearing, on the ground that they were not in actual use (*Biset v. Caldwell*, 1 Esp., 206 n). As for the cat, Coke said ages ago that pussies could not be distrained, because in them no man could have an absolute and valuable property; but that reason

## FURNISHED APARTMENTS.

is not applicable to costly Angoras, and *cessante ratione cessat et ipsa lex*. Woodfall says a bird may be taken (p. 284). Unfortunately the poor creature seized upon cannot make the other tenants or lodgers pay their share towards the debt (*Hunter v. Hunt*, 1 C. B., 300).

Because this right to distrain is a grievous remedy, in some places only the goods of the debtor himself are allowed to be taken, and not those of an under-tenant (Parsons, vol. i., 518: *Archer v. Wetherell*, 4 Hill (N. Y.), 112.)

If any new furniture is to be placed in the rooms by the landlord, and the intending lodger desires it done, the agreement had better be put into writing; for then no rent is payable until the promise is fulfilled (*Medielen v. Wallace*, 7 A. & E., 54; *Vaughan v. Hancock*, 3 C. B., 766).

Fortunately, when one gets settled in his abode, he need not care if the water-pipes in his rooms leak through the floors and injuriously affect the property of the tenant below, provided the defect was not known to him and could not have been detected without examination, and there has been no negligence on the tenant's part, for he is not bound at his peril to keep the water in the pipe (*Ross v. Fedden*, 7 Q. B., 661). The occupant of an adjoining apartment may, and probably will, if he has any æsthetic sensibilities, object to a stovepipe going from your room to the chimney in his; but if there had been one there before his arrival in the house, the strong arm of the law will nullify his opposition, for then he took his room subject to the easement of the black cylindrical smoke conductor and its necessary hole in the chimney, and he cannot cause your kettle to cease from singing or your pot from bubbling because his sense of the sublime and beautiful is offended (*Culverwell v. Lockington*, 24 C. P. 611).

Sometimes in these latter days of shoddy and of shams the boiler attached to the kitchen stove will explode with terrific uproar, doing considerable damage to the nerves of the inhabitants, and slight injury to the coarser portions of the human frame divine. If such a thing happen in a furnished house, even though caused by the want of a safety valve, the tenant need not, at least if in New York State, rush off to attack his landlord, unless he can prove that the latter knew of the defect, or had reason to apprehend a catastrophe if the boiler was used (*Taffe v. Harteau*, 56 N. Y., 398). Although on one occasion the Courts in the Empire State held the owner of the house liable for injuries caused by an explosion of gas arising from the pipes not being properly secured (*Kim-mell v. Burfield*, 2 Daly, N. Y., 155).

If it happen that on a rainy day a drip, drip, drip, a patter, patter, patter, is heard in the room, and ugly splashes of water are seen descending upon a most costly carpet or valued book, 'tis useless to cry out that the landlord must pay for the mischief done by his leaky roof; for, as Baron Martin lately observed, one who takes a floor in a house, must be held to take the premises as they are, and cannot complain that the house was not constructed differently. The storm may have blown off some shingles, and then, even were he bound to use reasonable care in keeping the roof secure, he could not be held responsible for what no reasonable care or negligence could have provided against. He could not certainly be considered guilty of negligence, if he had the roof periodically examined, and it was all secure when last looked at (*Carstairs v. Taylor*, L. R. 6 Ex., 223). But, by the way, in New York, a landlord, who himself occupied the top flat, and allowed liquids to leak through into the rooms of his tenants

## FURNISHED APARTMENTS.

below, was held liable (*Stapenhurst v. Am. Man. Company*, 15 Abb. Pr. N. S., 355). A layman might imagine that a landlord must keep his house in good order so that the occupant be not damnified, but a cleric knows that the law says quite the reverse; that he is not bound to do any repairs, however necessary, except such as he expressly agrees to do; no promise is implied; nor need he do anything, even though the main walls gape and yawn threateningly, and the pumps have to be worked several hours daily, to keep the basement free from water (*Arden v. Pullen*, 10 M. & W., 321; *Keates v. Cadogan*, 10 C. B., 591; *Gott v. Gandy*, 2 E. & B., 845; *Wiltz v. Matthews*, 52 N. Y., 512; *Taffe v. Harteau*, 56 N. Y., 398). 'Tis true, that, in New Hampshire, a couple of years ago, it was held that a landlord is liable for injuries accruing to his tenants if he negligently builds his house, or carelessly suffers it to continue in disrepair (*Scott v. Simons*, 54 N. H., 426). But then, a very high American authority tells us that the decisions of the Courts of other States are entitled to more weight than those of New Hampshire (16 A. L. J., 419).

Unfortunately for the poor tenant he must continue to pay rent, however wretched his house becomes, unless there has been an error or fraudulent misdescription of the premises, or they are found to be uninhabitable through the wrongful act or default of the landlord himself (*Lyon v. Gorton*, 7 Scott, 537), and perhaps even then (*Surplice v. Farnsworth*, 7 M. & G., 576). Even if the fire fiend swallows up the building, the landlord is entitled to his rent, just as if all had gone on as merrily as marriage bells, until regular notice to quit has been given, and the required time has rolled round (*Packer v. Gibbons*, 1 Q. B., 421; *Fowler v. Payne*, 49 Miss. 32). Of course, the length of notice required,

depends upon the nature of the tenancy, whether it be a yearly one, or from quarter to quarter, month to month, or week to week: a half-year's or a quarter's, or a month's, or a week's notice being requisite, as the case may be (*Parry v. Hazell*, 1 Esp., 94; *Woodfall, L. & T.* 8 Ed., 174). But even here Judges differ, and some say that in an ordinary weekly tenancy a week's notice to quit is not implied as a part of the contract, unless there is a special usage (*Huffel v. Armistead*, 7 C. P., 56; *People v. Geolet*, 14 Abb. Pr. U. S., 130). Yet those who hold to this latter view, think that a reasonable notice is needed (*Jones v. Mills*, 10 C. B., N. S. 788). Willes, J., on one occasion said, in a half frightened sort of way as if he knew that he was wrong, that because, in a tenancy from year to year, only six months' notice is required, therefore he could not see how it was possible that a tenant from week to week could be entitled to more than half a week's notice (*Ibid*). One cannot leave because the idea has possessed him that the landlord's goods and chattels are about to be seized for rent (*Ricket v. Tulleck*, 6 C. & P., 66), unless express stipulation has been made to that effect (*Bethell v. Blencome*, 3 M. & G., 119).

In the case of furnished lodgings all the rent is deemed to issue out of the land, none out of the tables and chairs, pots and pans (*Newman v. Anderton*, 2 Bos. & P. New R. 224; *Cadogan v. Kenet*, Cowp., 432).

The law will allow a landlord to make himself disagreeable in many ways, but he cannot insist upon locking-up the hall-door at an early hour in the evening; for when he rents his rooms he impliedly grants all that is necessary for their free use and full enjoyment (and that, in the case of most mortals, includes the use of the hall and stairs) whenever required, and not merely when he in his discretion

## FURNISHED APARTMENTS.

may deem best (*MacLennan v. Royal Insurance Company*, 39 U. C. R., 515). Nor can he object to the free use of the bell and knocker; in fact, an action will lie against him if he attempts to interfere with the reasonable use of all the necessary adjuncts of his furnished apartments (*Underwood v. Burrows*, 7 C & P., 26.) Though, if the tenants are of an undesirable class, the proprietor might, in mitigation of damages, shew that he acted in this surly way for the express purpose of getting rid of his lodgers (*Ibid*).

Occasionally newly arrived tenants of furnished rooms find that all the previous occupants have not moved out; that some—small, but aldermanic in shape—have no intention of leaving. Unwilling to test faithfully the truth of the scientific assertion that these creatures all retire to their nooks and crannies shortly after midnight, these fastidious individuals eagerly inquire if they can at once quit the haunted house. It seems that they can. Long since Baron Parke said that the authorities appeared fully to warrant the position that if the house is encumbered with a nuisance of so serious a nature that no one can reasonably be expected to live in it, the tenant can give it up; because there is an implied condition that the owner rents the place in an habitable state. Lord Abinger went even further, and stated that he thought that no authorities were wanted to establish the point, that common sense was enough to decide it. He thought that tenants were fully justified in leaving under such circumstances (*Smith v. Marrable*, 11 M. & W., 5: Addison on Contracts, 375).

Some gentlemen, learned in the law, have, however, thought that these Judges were mistaken in this, because, in some later cases, it has been held that there is no implied warranty in the lease of a house, or of land, that it should be rea-

sonably fit for habitation, occupation or cultivation, and that there is no contract (still less any condition) implied by law on the demise of real property, only that it is fit for the purpose for which it is let (*Hart v. Windsor*, 12 M. & W., 68; *Sutton v. Temple*, *Ib.*, 57; *Searle v. Laverick*, L. R. 9 Q. B., 131). But then, in some of these latter decisions the case of a ready-furnished house is expressly distinguished, upon the ground that the letting of such a house is a contract of a mixed nature, being, in fact, a bargain for a house and furniture, which of necessity must be such as are fit for the purpose for which they are to be used. Lord Abinger was particularly strong upon the point; he said that "if a party contract for the lease of a house ready furnished, it is to be furnished in a proper manner and so as to be fit for immediate occupation. Suppose, said he, it turn out that there is not a bed in the house, surely the party is not bound to occupy it or continue in it. So, also, in the case of a house infested with vermin; if bugs be found in the beds, even after entering into possession, the lodger or occupier is not bound to stay in it. Suppose, again," his lordship continued, "the tenant discovers that there are not sufficient chairs in the house, or they are not of a sort fit for use (short of a leg, we presume), he may give up possession" (*Hart v. Windsor*, *supra*). And so late as April in the last year of grace, Lord C. B. Kelly said that it was his opinion, both on authority and on general principles of law, that there is an implied condition that a furnished house shall be in a good and tenantable state, and reasonably fit for human occupation, from the very day on which the tenancy is to begin, and that when the house is in such a condition that there is either great discomfort or danger to health in entering or dwelling in it, then the intending tenant is enti-

## FURNISHED APARTMENTS.

ted to repudiate the contract altogether (*Wilson v. Finch Hatton*, L. R., 2 Ex. Div., 343). Judge Shaw, of Massachusetts, says that when furnished rooms in a lodging-house are let for a particular season a warranty is implied that they are suitably fitted for such use (*Dutton v. Gerrieh*, 63 Mass., 94), and Abinger thought that the proprietor was bound to supply whatever goods and chattels might be necessary for the use and occupation of a house such as the one let.

Across the line it has been held that the existence of a noxious smell in a house does not afford the tenant a reasonable excuse for leaving (*Westlake v. De Grau*, 25 Wend., 669). But my lady, the Dowager Countess of Winchelsea, found otherwise. She agreed to rent a furnished house in Wilton Crescent, London, for three months of the season of 1875 for 450 guineas; but when she arrived, with her servants and personal baggage, an unpleasant smell saluted her aristocratic nostrils, so she declined to occupy the mansion, and, ordering round her horses, drove off. On investigation, the drains were found to be in a shocking state: it took three weeks to make the place fit for habitation, and then the Countess refused to go back or pay any rent. The lawyers then had to appear on the scene, and after them the judges. These latter bewigged gentlemen unanimously held that the state of the drain, entitled her ladyship to rescind her bargain, and to refuse to pay the rent (*Wilson v. Finch Hatton*, L. R. 2 Ex. Div. 336).

Some people object to scarlet fever and small-pox (perhaps rightly so), and do not like to take up their quarters in houses where persons have lately departed this life through the assistance of these diseases. To such particular persons it may be a comforting reflection to know that Lord Abinger thought that if a new

tenant found that the old one had left because some one had recently died in the lodgings of the plague or scarlet fever, the incomer might legally retire (*Smith v. Marrable*, 11 M. & W. 5); and that in Massachusetts a man who caught small-pox, through no fault of his own, but because the owner of the house wilfully neglected to inform him that the rooms were infected with that disease, might recover damages from the landlord (*Minor v. Sharon*, 112 Mass., 477), always provided, we suppose, that he recovered from the small-pox in the first place.

Chairs and tables in furnished apartments are oft times weak in the legs (owing to their long standing); it is well, therefore, to know that an occupier of such places is not responsible for deterioration by ordinary wear and tear in the reasonable use of the goods of the landlord (*Add. on Contr.* 377).

If a lodger sports a brass-plate, bearing his patronymic, on the front door, the landlord is not at liberty to take it off. A Dr. Lane hired certain rooms from one Johnson, with the privilege of putting up his plate on the door: Johnson shortly afterwards leased the whole premises to one Dixon for twenty-one years. The health of the community being good, the doctor got behind in his rent; so Dixon removed the plate and refused him access to his rooms; in fact, he actually fastened the outer door against the doctor. The medico sued for damages, and the jury gave him £10 for the breaking and entering his rooms, expelling him therefrom and seizing his *et ceteras*, and £20 for the removal of the plate. Dixon was dissatisfied with the verdict, and appealed to the Court, but the Judges sustained the finding, considering the removal of the plate a distinct and substantial trespass (*Lane v. Dixon*, 3 M. G. & S. 776).



## FURNISHED APARTMENTS—INTEREST UPON INTEREST.

A different decision was arrived at in *Hartley v. Blozham* 3 Q. B., 701, where the defendant, claiming that money was due him by the plaintiff, his lodger, locked up the defaulter's goods in the room, pocketed the key, and refused poor Hartley access to them until the bill was paid; it was held that there was no trespass. But in this latter case the landlord never actually touched the goods, he only locked up the door and kept the key. Where a landlord, before his boarder's time was up, contrary to his wishes, entered his room, and removed therefrom books, maps and papers, placing them where they were damaged by the rain, the Court decided that he was a trespasser, and made him pay for all the injuries sustained, both that arising from the direct and immediate act, and that happening remotely from the act of God (*Nowlan v. Trevor*, 2 Sweeny, N. Y., 67).

And now we think that we have given the amiable persons mentioned in the beginning of this article as much advice as they can stand at present; if they need further information let them apply to some practitioner near at hand, and pay for it. All we would now say is, "Do not go to law with your landlord," for, as Mr. Owen Feltham wrote in 1670, "To go to law is for two to contrive the kindling of a fire to their own cost, to warm others, and sinder themselves to cynders."

R. VASHON ROGERS, JR.

## SELECTIONS.

## INTEREST UPON INTEREST.

There is a wide-spread impression among laymen that to receive interest upon interest is a violation of the laws against usury. It prevents the

creditor from receiving compensation for his debtor's delay even when it is tendered, which the law permits him to take and retain, although it will not assist him to recover it from an unwilling hand.

To compound the interest piles up the debt with fearful rapidity, but on the other hand there appears to be no reason why the debtor should not suffer the usual penalty for his default, and be compelled to recompense his creditor for the damage the law assumes in similar cases that he has suffered.

The common law was averse to interest of any kind, simple or compound, and the prejudice against compound interest has survived to our own times, although the aversion is now justified on the broad ground of public policy.

In this State interest upon interest is only allowed under special circumstances, but the moral justice of the demand is acknowledged and the creditor's title is perfect when he has received the money.

In the case at least of instruments to secure the payment of debt after a long lapse of time, and providing that it shall bear interest payable at fixed times, it would seem that in the event of any such installment of interest remaining unpaid interest upon it should be recoverable.

As Judge Monell said in one case: "The moment interest becomes due it is a debt." Moreover the debtor is bound to seek his creditor and pay it (*Williams v. Hance*, 9 Paige, 211). Why should not interest be allowed upon failure to pay this debt as well as upon any other? Such an allowance of interest certainly would not conflict with the usury laws. They forbid "any greater sum or greater value for the loan or forbearance of any money, goods or things in action" to be taken, than seven dollars upon one hundred dollars for one year. This would hardly seem to forbid an award of interest as damages in such a case. It would not be a payment for the loan of the original sum, but a penalty for the debtor's delay in making payment of a distinct and separate debt.

That it cannot be recovered when voluntarily paid shows yet more distinctly that taking interest upon interest is not forbidden by the usury laws. Then again

## INTEREST UPON INTEREST.

it cannot be recovered if a demand has been made of it. This certainly precludes the idea of usury. In several cases it has been clearly stated that it is not because it is usurious that interest upon interest is not allowed, but that it is frowned upon because it is opposed to the policy of our law as tending to injury and oppression.

It seems too to be still under the ban of that mediæval prejudice which prohibited all taking of interest and stigmatized it in the English statute (21 James I, ch. 17), permitting it among sinful men as unlawful in point of religion and morals.

But whatever the analogy that pleads for interest upon interest in certain cases, the current of the decision has been too strong against it in this State to permit the courts to grant it except under exceptional circumstances.

In *Townsend v. Corning*, 1 Barb. 627, Gridley, J., in the course of his opinion upon the validity of a note given partly for interest upon interest, says: "Yet I will assume, as the law of this case, that a reservation in a new security of compound interest that had accrued upon a sum previously due, against the will of the debtor, and as a condition of forbearance upon the new security, affects the security with usury and makes it void." He then says it becomes a question of fact whether it was extorted as a price for forbearance and against the will of the debtor, and there being no evidence to show either of these usurious ingredients, decides that the security is valid.

As appears from the foregoing his assumption of law was not necessary to the decision of the case, for there was no evidence of objection by the defendant. But whatever its necessity the assumption has foundation in either the statute or common law of the State.

In *Kellogg v. Hickock*, 1 Wend. 521, it had been decided that if parties accounted together concerning the amount due and by the consent of the debtor included compound interest, the new security for the amount including it was not usurious. Although the conclusion arrived at was correct it was reached upon false grounds, for it was assumed,

as in the former case, that interest upon interest included in a security might make it usurious and void, while, as we have said before, it is never on the ground of usury that compound interest is not permitted to be taken, but because it is regarded as unjust and oppressive.

The learned judges seems to have had in their minds the relief that equity gives to any contract forced upon a party by duress and oppression, not meaning that compound interest could avoid an instrument, but that if by an unconscientious misuse of his debtor's necessities the creditor exacts compound interest, a court of equity could relieve him as they would from any other contract he might be brought into by such means (*Thornhill v. Evans*, 2 Atk. 330). Finally this assumption has not been adopted in subsequent decisions, for we never again find the question of forbearance and willingness raised, while it has been expressly decided that a demand of interest is sufficient to turn it into principal which from thenceforth draws interest.

The cases of *Crippen v. Hernance*, and *Williams v. Hance*, in 7 and 9 Paige, are sometimes cited to sustain the proposition assumed by Judge Gridley. The most cursory examination will show that in each case the security was contaminated by a transaction which the chancellor declared a mere shift to cover usury.

In *The State of Connecticut v. Jackson*, 1 Johns. Ch. 13, Chancellor Kent examined the subject of compound interest as regarded in equity, and laid down the principles by which our courts have since been guided in their consideration of this subject. The question was upon the confirmation of the report of a master to whom it had been referred to compute the amount due upon a bond and mortgage; the report contained a computation and account allowing interest upon the installments of interest due and unpaid. He examines the principles and decisions bearing upon the subject in an opinion unusually lucid and learned even for our great chancellor, and declares that compound interest has never been allowed except under special circumstances.

## INTEREST UPON INTEREST.

It appears, that the question of allowing compound interest was raised in Chancery as early as 4 Car. I. At that early period it was laid down as the rule that interest upon interest was not allowed. An exception was afterward (Car. II) allowed in favor of the assignee of a mortgage, and the amount of the principal and interest really and *bonâ fide* due and paid by him was allowed to carry interest. But this case was overruled by Lord Chancellor Shaftesbury, who allowed interest on the principal sum only. Afterward the Lord Keeper said such an allowance of interest upon interest to the assignee was reasonable and just, although he appears to have followed the precedent just mentioned. Subsequently, in *Gladman v. Henchman*, 2 Vernon, 135, such interest was allowed to the assignee. The cases on this point are loose and contradictory, and even on the general question of the allowance of compound interest the *dicta* up to 1688 are both ways. But since the revolution the general rule that interest upon interest is not allowed except under peculiar circumstances, has been well established, although the rights of an assignee of a mortgage may be still in doubt. In our own reports we are not without the least *dicta* upon this subject. The case of *Jackson v. Campbell*, 5 Wend. 572, although decided upon another point, touches this question. It is there laid down that "where a mortgage is assigned with the concurrence of the mortgagor, the assignee shall be entitled to interest upon the interest paid by him, as well as upon the principal of the mortgage; but if the assignment is made without the privity of the mortgagor it does not carry interest. This does not seem to go quite as far as the anonymous case in Banbury's Reports, 41, where it is said that if the mortgagee had applied to the mortgagor before the assignment and demanded his money and required him to join in the assignment, if the mortgagor refuses either to pay or join in the assignee shall recover interest both on the principal and interest. This case would seem to be sound on principle, for all the later cases hold that interest may be re-

covered upon interest from the time payment is demanded, and as the assignee stands in every respect in the shoes of his assignor he ought to be able to avail himself of the demand as his assignor might.

Lord Thurlow, although he expressed the opinion that there was nothing unjust in allowing interest upon interest, said that he would have to overturn all the proceedings of the Court of Chancery if he allowed it generally. In certain cases it has always been allowed, as where there is a settlement of an account between the parties after interest has become due where there is an agreement to allow it after it has become one, or where the master's report computing the sum due for principal interest has been confirmed, for it is then in the nature of a judgment.

While such special circumstances may turn interest already due into principal, and permit interest to accrue upon it, an agreement to pay interest upon the interest that may thereafter accrue, if it is not paid punctually at the stated times, will not be enforced. The first case upon this point found in the books, is *Sir Thomas Meers' Case*, cited by Lord Chancellor Talbot in *Bosanquett v. Dashwood*, Ca. Temp. Talb. 40, and followed in succeeding cases.

Sir Thomas Meers had inserted a covenant in some mortgages that if the interest was not paid punctually at the day, it should from that time, and so on from time to time to be turned into principal. Lord Chancellor Harcourt relieved the mortgagors from the covenant as unjust and oppressive. This established principle of English jurisprudence has never been questioned in this State. But it would appear that the rule, in its strictness, applied to landed security only, for, as appears from the observations of Lord Thurlow and Lords Commissioners Mather and Athurst, compound interest might be allowed between the parties to mere personal agreements, upon the ground of a contract to allow it, either express or to be inferred from circumstances. But while our judges have noticed this distinction, they seem to have inclined to extend the rule to debts on simple contract. While

## INTEREST UPON INTEREST.

such an agreement will not be enforced, it is not to be regarded as usurious, and will not contaminate and avoid the rest of the contract.

In *Stewart v. Petrie*, 55 N. Y. 621, ten years' interest was due on a mortgage, and foreclosure proceedings were discontinued on a note being given for arrears and interest; suit was brought on the note, and the defence of usury was interposed. In the opinion of the court, per Allen, J., it is said: "The receiving of interest upon interest is not a violation of the Statute of usury, as no more than seven per cent. is in such cases taken or received. It is true that an agreement in advance for the payment of interest upon interest, as the same shall accrue, cannot be enforced, not because it is usurious, but for the reason that such an agreement is regarded in this State as against public policy as one that may be made oppressive to the debtor—but a prospective agreement after the interest has accrued, to pay interest thereon, is valid. So, too, a security for interest upon interest, given after it has accumulated, and in the absence of any prior undertaking to pay it, is valid, and supported by a good consideration." The learned judge does not say what this good consideration is, but it is undoubtedly the moral duty to recompense the creditor for the delay. For in equity a moral obligation is considered to be of sufficient consideration to uphold an express agreement to fulfill it.

And the case of *Mowry v. Bishop*, 5 Paige, 103, we find this moral obligation is the consideration assigned to support agreements. In the course of the same opinion, the learned judge refers to the case of *Van Benschoten v. Lawson*, 6 Johns. Ch. 313, wherein Chancellor Kent said that such an agreement must not only refer to interest then due, but must be prospective, and that if the contract be that interest shall be paid upon interest from some previous time when it became due, it will not be enforced. He does not examine the foundation for this opinion, but simply states that the doctrine that such contracts will be enforced, whether retrospective or prospective, is now too well settled by

authority in this state to be questioned.

In the case of *Thornhill v. Evans*, *supra*, Lord Hardwicke directed the master to inquire what arrears of interest were agreed, from time to time in writing, to be turned into principal.

In *Van Benschoten v. Lawson*, Chancellor Kent adopted this rule, and said that the agreement to pay interest must be in writing. Later the rule requiring a writing was approved by Justice Balcom in the case of *Forman v. Forman*, 17 How. 257.

However, many cases take the view that a demand is all that is necessary to turn interest into principal, and make it bear interest from the date of that demand (*Connecticut v. Jackson*, 1 Johns. Ch. 16).

In the case of *Howard v. Farley*, 19 Abb. Pr. 129, Judge Monell says: "If the interest is demanded when due, it becomes principal from that time, and interest upon it should be recoverable."

These and the later cases, generally, are evidently inconsistent with the rule requiring a writing, which may probably be regarded as abandoned at least as to prospective contracts.

From the foregoing cases, and the principles that are a necessary deduction from them, it is evident that where interest is paid upon interest, the transaction is not usurious. It must be equally clear, and it is certainly quite as well settled, that money paid for compound interest cannot be recovered back (*Stewart v. Petrie*, 55 N. Y. 621). The case of *Boyer v. Pack*, 2 Denio, 107, seems to have been cited in some cases as sustaining the position that it can be recovered, but that case was expressly decided upon the ground of a mistake of fact.

The present law of the State upon the subject of compound interest, then seems to be:

I. As a general rule interest is not allowed upon interest.

II. That a provision in a contract for interest upon future instalments of interest which remain unpaid, will not be enforced, but it will not contaminate the rest of the contract so as to render it usurious or void.

## INTEREST UPON INTEREST—JUDGES BY DESCENT.

III. That a contract to pay interest upon interest due at the time is upon a sufficient consideration and valid, and may be retrospective in its action, and provide for the payment of interest from a time then past.

IV. That from the time payment of it is demanded, interest bears interest.

V. That if interest is paid upon interest, it cannot be recovered back, although the law would not have compelled the debtor to pay it.—*Albany Law Journal*.

## JUDGES BY DESCENT.

The appointment of the Hon. Alfred Thesiger, Q.C., to the vacant judgeship in the Court of Appeal will be received with some surprise by the public and the legal profession. Mr. Thesiger has for some time been favourably known to the world as a rising lawyer of competent ability and great industry, but not as possessing any of the extraordinary qualities which would give him a meteor-like rise. If he possessed any of these qualities there would be nothing remarkable in the case. Mr. Thesiger is only thirty-nine years of age, but the present Lord Cairns when he was made Solicitor-General was a year less. If, however Mr. Thesiger possessed any of the transcendent powers of Mr. Hugh Cairns he would not have been reserved for the present appointment, but would have been chosen Solicitor-General when Sir Hardinge Giffard was appointed. Both were Conservative lawyers of merit, and without a seat in Parliament; and of the two, Mr. Thesiger, from the traditions of his name, was a great deal more likely to obtain a seat than Sir H. Giffard. Moreover, Mr. Thesiger is but barely qualified by professional standing for the office of Judge of appeal. Being raised directly from the bar, and not having served as a judge of first instance, the Act of Parliament requires fifteen years' standing. Mr. Thesiger was called to the bar on June 11, 1862, so that he has been a little more than five months qualified to take his seat.

When Lord Bacon became Lord Chancellor, he is said, in inaugurating the office, to have made use of the following words from the woolstack: 'I have a fancy. It falleth out that there are three of us, the King's servants in great places, that are lawyers by descent—Mr. Attorney, son of a judge; Mr. Solicitor, likewise son of a judge; and myself, a Chancellor's son. Now, because the law roots so well in my time, I will water it at the root thus far. As, besides these great ones, I will hear any judge's son before a serjeant.' Lord Bacon's antipathy to the serjeants, to which body he had failed to belong, was the motive for his 'watering the root' in the way thus quaintly expressed. But 'the law roots well' in our time as it did in Bacon's. We have as 'lawyers by descent,' Lord Coleridge, Baron Pollock, and Mr. Justice Denman, to whom Lord Justice Thesiger's name must now be added. It may be added that a successful lawyer is frequently born. 'Lawyers by descent,' however, need not be ashamed of their birthright when they point to Lord Bacon as a conspicuous example of their class—the son of Sir Nicholas Bacon, and in his nursery Queen Elizabeth's 'little keeper.' But it must be remembered that Lord Bacon had little of the paternal 'watering at the root,' as his father died when he still had to make his way in the world. There have been other brilliant examples of illustrious sons of illustrious lawyers. Bacon accounts himself in the passage we have quoted as a Chancellor, the son of a Chancellor, although Sir Nicholas Bacon's designation was more properly Lord Keeper; but we have one undoubted example of two Chancellors in successive generations—the ill-fated Lord Chancellor Charles Yorke was the son of Lord Hardwicke, one of the most distinguished lawyers who sat on the woolstack. Charles Yorke was the three days' Lord Chancellor who, at the solicitation of George III., deserted his party and accepted office under the Duke of Grafton; and afterwards, stung by the reproaches of his brother and political friends, put an end to his own life. He was Lord Chancellor, having received the Great Seal, but was not a peer, as, at the time

C. L. Cham.] MITCHELL v. MULHOLLAND—ANGERS v. QUEEN INSURANCE CO. [Quebec Rep.]

of his death, the patent lay unsealed in his room; and it is said that some officious friends wished to apply the seal to it during his life, but were prevented by Lord Hardwicke, his brother. A closer analogy to the case of Mr. Thesiger will be found in that of Thomas Erskine, judge of the Common Pleas, who was the son of Lord Chancellor Erskine, the famous advocate. The instances of the son of a Lord Chancellor attaining the bench are, of course, not numerous; but cases of judges' sons becoming judges are common enough to warrant the foundation of general principles upon them. — *Law Journal*.

## CANADA REPORTS.

### ONTARIO.

#### COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. BUCK, M. A. Student-at-Law.)

#### MITCHELL v. MULHOLLAND.

*Prohibition—Division Courts—New trial.*

*Held*, that Con. Stat. U. C., cap. 19, sec. 107, giving the judge power to grant a new trial within fourteen days is imperative, and that the judge has no power to grant a new trial after the expiration of fourteen days,

[December 1, 1877—MORRISON, J.]

This case, which was an application for a writ of prohibition, to prohibit a Division Court judge from granting a new trial after the expiration of fourteen days, and which is reported *ante infra*, vol. xiii., p. 224, was reconsidered by the learned judge, no order having issued discharging the summons.

*D. B. Read, Q.C.*, in support of the application for a writ of prohibition.

The judge may order a new trial upon the application of either party within fourteen days after the trial: Con. Stat. U. C., cap. 19, sec. 107. By sec. 63 of same statute the Governor may appoint judges to frame rules, and by sec. 66 the rules and forms so approved of shall have the same force and effect as if they had been made and included in this Act. By Division Court Rule No. 52, an application for a new trial may be made, and the application and affidavits (if any), together with an affida-

vit of service thereof shall be delivered to the Clerk within fourteen days after the day of trial. see *Re Applebee v. Baker*, 27 U. C. R., 486. The word *shall*, in above Rule 52, having the same force as the Division Court Act itself, would seem to make the Act imperative that the application for new trial should be made within fourteen days: see *Davidson v. Gill*, 1 East, 64. As to the construction of the word "upon," see sec. 107 referred to, and *Reg. v. Humphrey*, 10 A. & E., 335. He also cited *Dwarris on Statutes*, 662, 611, and *Mossop v. Great Northern R. Co.* 16 C. B., 580. When an applicant is entitled to the writ, the Court will give it, notwithstanding the smallness of the claim, as a matter of right: see *Worthington v. Jeffries*, L. R. 10 C. P., 379, and *Elston v. Rose*, L. R. 4 Q. B., 4.

MORRISON, J. after taking time to consider, held that the judge had no power to grant a new trial after the expiration of the fourteen days from the first trial. He therefore granted an order for a writ of prohibition to issue.

*Order accordingly.*

### QUEBEC.

#### COURT OF QUEEN'S BENCH—APPEAL SIDE.\*

ANGERS, Appellant, v. THE QUEEN INSURANCE CO., Respondents.

*Powers of Local Legislatures—Stamp duty on Insurance Policies—Quebec Statute*, 39 Vict. c. 7.

*Held*, (affirming the judgment of the Superior Court, 21 L. C. J. 77) that the Quebec Statute, 39 Vict. c. 7, requiring insurance companies doing business in the Province of Quebec to take out a license, the price of which should be paid by stamps affixed to the policies issued, is unconstitutional.

[MONTREAL, Dec. 14, 1877.]

The Legislature of Quebec passed an Act, 39 Vict. c. 7, requiring insurance companies doing business in the Province of Quebec to take out a license, the price of which should consist in the payment to the Crown for the use of the Province of a percentage on premiums, and the percentage was made payable by stamps affixed to the policies issued. The right to impose this tax being denied by the companies, the present action was instituted as a test-case by the Attorney General of the Province, on be-

\* *Before*:—Chief Justice DORION, and Justices MOIR, RAMSAY, THESIGER, and TACHÉRAU *ad hoc*.

Quebec Rep.]

ANGERS V. QUEEN INSURANCE CO—NOTES OF CASES.

[C. of A.]

half of the Crown, charging the respondents with infraction of the Statute.

The respondents pleaded the unconstitutionality of the Statute, inasmuch as it levied an indirect tax upon insurance business, and thereby encroached upon the exclusive jurisdiction of the Parliament of Canada.

The Court below (Torrance, J.) maintained the plea, and the action was dismissed.

*Carter*, Q. C., and *Lacoste*, Q. C., for appellant.

*Abbott*, Q. C., *Kerr*, Q. C., and *Doutre*, Q. C., for respondents.

*RAMSAY*, J., differing from the majority, would be for reversing the judgment appealed from. The tax levied by requiring stamps to be placed on insurance policies, though not direct taxation within the meaning of section 92 of the B. N. A. Act, par. 2, yet fell within par. 9 of the same section, permitting Local Legislatures to issue licenses for the raising of revenue for Provincial purposes. The payment of the license fee by stamps was simply a mode of collection, and was the most equitable mode that could be adopted.

*DORION*, C. J., held that the charge imposed on licenses by the Statute was clearly an indirect tax, and the attempt to put it in the form of a license was an evasion of the B. N. A. Act, from which the Local Legislature derives its powers. His Honor abstained from expressing any opinion upon the question, not raised here, whether the Local Legislature has not power to force insurance companies to take a license at a fixed sum.

*Judgment confirmed.*

—*Legal News.*

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

From C. C. Ontario.]

[January 9.]

THOMAS V. AMERICAN EXPRESS COMPANY.

*Carriers—Contract to carry there and back—One rate.*

The plaintiff, who was a poultry fancier, being desirous of sending some fowls and

pigeons to the Hamilton Exhibition, made inquiries of the agent of the Canadian Express Company, at Whitby, as to the cost of their carriage to Hamilton and back. The Canadian Express Company's line did not run further in that direction than Toronto, from which point to Hamilton goods were carried by the defendant's Company. Both Companies were carrying goods to the Exhibition at special rates, and the plaintiff asked the agent to ascertain the defendant's rates. The agent communicated with the defendant's agent, who was also the agent of the Canadian Express Company, at Toronto, but the correspondence was not produced. Subsequently the plaintiff delivered the birds to the agent of the Canadian Express Company, at Whitby, to whom he paid the freight for their carriage to Hamilton and back. The birds, on arrival at Hamilton, were received by the plaintiff. After the Exhibition was over the plaintiff requested the defendant's agent at Hamilton to send them back by a certain train, which he agreed to do, and gave him labels to address and attach to the crates, promising to send some one to receive them. The plaintiff afterwards pointed out his birds to a man sent by the Company, who promised to take charge of them, but allowed a number of the pigeons to fly away. This action was brought to recover their value.

*Held*, reversing the judgment of the County Court, that the evidence showed that the contract was with the Canadian Express Company to carry to Hamilton and back for one rate, and that the defendants, therefore, were not liable.

*Monkman* for the appellant.

*McMichael*, Q. C., for the respondent.

*Appeal allowed.*

From Q. B.]

[January 15.]

ALLEN V. McTAVISH.

*Statute of limitations—Covenant—Mortgage.*

The declaration charged that the defendant, by deed dated 24th November, 1856, covenanted to pay one J. H., or his assigns, a certain sum of money, with interest, in four equal annual instalments, the first of which became due on the 24th November, 1856, and that the said J. H. assigned the said mortgage to the plaintiff, yet the defendant did not pay the principal moneys or interest, or any part thereof.

The defendant pleaded that the plaintiff's

C. of A.]

NOTES OF CASES.

[C. of A.]

claim was a sum of money secured by way of mortgage upon certain lands in this Province, and that the suit was brought to recover the same, and that the alleged cause of action did not arise within ten years before this suit.

*Held*, (Moss, C. J. A., Burton, Patterson, JJ.A., and Blake, V. C.), reversing the judgment of Morrison, J., overruling a demurrer to the plea, that the limitation, under 38 Vict. cap. 16, sec. 11, of ten years within which an action must be brought to recover money secured by a mortgage, does not extend to a covenant contained in the mortgage for payment of the amount.

*Bethune*, Q.C., (with him *A. Galt*) for the appellants.

*Ferguson*, Q.C., for the respondent.

*Appeal allowed.*

From C. P.]

[January 15.]

LA BANQUE NATIONALE V. SPARKS.

*Application to re-stamp under 37 Vict. cap. 47, s. 2.*

Upon the announcement of an intended decision in this case differing from that of the Court of Common Pleas, in which they held that the curative sections of 31 Vict. cap. 13, sec. 12, as amended by 37 Vict. cap. 47, sec. 2, did not apply to bankers and brokers, the counsel for the plaintiffs applied to stay the certificate until he could make an application to take the note out of Court for the purpose of stamping it. The Court granted the application, and after the note had been stamped, a motion was made for an order granting a new trial, or for a nonsuit, or for such other relief as it was competent for the Court to give. It appeared that the particular objection to the stamping of the note was called to the attention of the plaintiffs' counsel during the argument in the Court below; but it was not shown that any application had been made to that Court, at the time, for the note to re-stamp it.

*Held*, (Burton, Patterson, JJ.A., Harrison, C.J., and Blake, V.C.) that the plaintiffs were not entitled to the relief asked, as they had not availed themselves of the privilege of stamping the note under 37 Vict. cap. 47, sec. 2, as soon as they acquired a knowledge of the defect.

*Snelling*, for the plaintiffs.

*M. C. Cameron*, Q.C., and *McMichael*, Q.C. for the defendant.

*Motion refused.*

From C. C. Hastings]

[January 15.]

DONNELLY V. CROSBY.

*Verdict rendered by mistake.—Changing of same by Judge.*

In this case, the jury, after being out for some time, came into court with their verdict, which was taken down by the judge as verdict for defendant and so read over to the jury and recorded. The jury were discharged, and about half-an-hour afterwards, one of the jurymen told the judge that the verdict given was for the plaintiff, whereupon the judge called back the jury, some of whom had left the court room, put them into the box, and polled them, when they all said that the verdict was for the plaintiff. The judge did not then alter the verdict, but two days afterwards, and after hearing counsel, he struck out the verdict for the defendant, and entered it for the plaintiff, and afterwards refused in term to disturb such verdict.

*Held* (Moss, C. J. A., Burton, Patterson, and Morrison, JJ.A.) that the judge had no power so to change the verdict; and the appeal was allowed with costs, and a new trial without costs in court below granted.

*H. J. Scott*, for appellant.

*G. E. Henderson*, Q.C., and *G. D. Dickson*, for respondent.

*Appeal allowed.*

From C. C. Wentworth.]

[January 16.]

NORDHEIMER V. ROBINSON.

*Contract—Construction of—Hire Receipt.*

The defendant, wishing to purchase an organ from the plaintiff on credit, gave him a conditional hire receipt, which acknowledged the receipt of the organ on hire at \$4 a month, but gave him the right to purchase it for \$129, payable as follows: a cash payment of \$50, and the balance with interest in one year from date; and it was stipulated that the organ should remain the plaintiff's property, on hire, until payment was fully made. The defendant paid the \$50 and obtained the instrument. At the expiration of the year, the defendant was granted an extension of time—which was followed by similar indulgences, until at last being pressed for payment by the plaintiff's agent, he offered to pay \$50 cash, and balance in four months. Their agent communicated this offer to the plaintiffs, who replied, "As we require this matter closed-up you can accept.



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NOTES OF CASES.

[C. of A.]

the \$50, provided he gives you a note for the balance at four months." The defendant paid the \$50 and gave the note as required, and the agent handed him a receipt for *balance* on account of organ. The note was not paid at maturity, and an action of replevin for the organ was brought.

The judge left it to the jury to say whether the note was taken conditionally or on account, or was a settlement of the balance due, and that from thenceforth the organ was to be the defendant's.\* The jury found a verdict for the defendant.

*Held* (Moss, C.J.A., Burton, Patterson and Morrison, JJ.A.) reversing the judgment of the County Court, that the construction of the contract was for the court; and that there was no evidence that the note was given in satisfaction of the unpaid residue of purchase money, and accepted by the plaintiffs upon the understanding that their rights under the hire receipt were terminated.

*Held*, also, that interpretation of a mercantile contract is not necessarily for the jury.

*H. Cameron, Q.C.*, for the appellants.

*Rose*, for the respondent.

*Appeal allowed.*

From C. P.]

[January 18.]

ANDERSON V. MUSKOKA MILL AND LUMBER COMPANY.

*License to cut timber—Right to timber after issue of patent—31 Vict. cap. 8 (O.).*

*Held*, affirming the judgment of the Common Pleas, that a license to cut timber on lands comprised in the Free Grant territory, under the Free Grant and Homestead Act of 1868, 31 Vict. cap. 8 (Ont.), and located under that Act, does not enable the licensee to cut timber after the issue of the patent, although during the currency of the license year.

*McCarthy, Q. C.* (with him *Pepler*), for the appellants.

*Lount, Q.C.*, for the respondent.

*Appeal dismissed.*

From C. C. Kent.]

[January. 16.]

WELCH V. OUILLETTE.

*Puis darrein continuance—Set-off.*

The plaintiff declared on a promissory note, and the defendant pleaded non fecit, payment and set-off, upon which pleas issue was joined. After joinder the defendant pleaded that after

the last pleading the plaintiff became and was, and still is, indebted to the defendant in an amount greater than the plaintiff's claim upon the joint and several promissory note of the plaintiff and one John Welch, which had become due since the last pleading, and which the defendant was willing to set off against the plaintiff's claim.

*Held*, (Moss, C.J.A., Burton, Patterson and Morrison, JJ.A.) reversing the judgment of the County Court, that the plea was clearly bad.

*McMichael, Q.C.*, for the appellant.

*Atkinson*, for the respondent.

*Appeal dismissed.*

From C. C. York.]

[January 16.]

ABELL V. KRONKHITE.

*Patented machine—Implied warranty—Misdirection.*

This was an action brought to recover the price of a well-known patented machine with which the plaintiff had supplied the defendant in accordance with a written order to deliver to him "your six-horse power separator." Under the contract the property had vested in the defendant, but he sought to prove a rescission with the consent of plaintiff's agent. Evidence was given to shew that the agent had warranted it to do good work when properly used. The judge told the jury that there was either an implied or an express warranty, and directed them to find a verdict for the defendant if the breach of warranty was established to their satisfaction.

*Held*, (Moss, C.J.A., Burton, Patterson and Morrison, JJ.A.) reversing the decision of the County Court, that the direction was clearly wrong, as there is no implied warranty in the case of a well-known patented article; and even if there were a breach of an express warranty the property having passed, the defendant could not rescind the contract, but was only entitled to shew how much less valuable the machine was by reason of the defect.

*MacLennan, Q. C.*, (Ewart with him) for the appellant.

*Machar*, for the respondent.

*Appeal allowed.*

From C. C. York]

[January 16.]

MASON V. BICKLE ET AL.

*Agreement for hire and sale of organ—Property passing—Estoppel.*

The plaintiffs sold one R an organ on

credit, and in accordance with their custom in such cases, prepared a document called a hire receipt, which acknowledged the receipt of the organ on hire. It contained a stipulation that the signer might purchase the organ at the price of \$130, payable in two equal instalments, on the 1st February, 1875, and the 1st February, 1876, but with the condition that until the whole of the purchase money should be paid, the organ should remain the property of the plaintiffs on hire, and in default of punctual payment of either instalment, or the monthly rental in advance, the plaintiffs might resume possession of the instrument without any previous demand, although a part of the purchase money might have been paid, or a note or notes given on account thereof.

This receipt and a note dated 17th February, 1874, payable four months after date, were signed by R, but it was afterwards observed that the receipt bore no date, whereupon the book-keeper filled in the 25th February, 1874. The plaintiffs discounted the note with their bankers, and shortly after maturity obtained a renewal, and returned it to R. The first instalment was paid, and renewals of the note were given until September, 1875. In May, 1876, R transferred the organ to Ouillette & Bickle, as security for a debt he owed them. He represented to them that he had paid the purchase money, and produced as evidence the promissory note of February 17th, 1874, which had been returned to him by the plaintiffs upon renewing. The note bore marks of having been discounted, but there was nothing to connect it with the organ. The organ was brought to the house of J. W. Bickle, one of the defendants, where it remained until it was seized by the plaintiffs' agents, and removed to the express office. The defendant, George Bickle, by the direction of J. W. Bickle, retook it and brought it back to the house in which they both resided. Subsequently J. W. B. sold the instrument to George.

*Held*, (Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.) reversing the judgment of the County Court, that the plaintiffs were not estopped from proving their ownership of the property.

*Held*, also, that there was ample evidence of a joint conversion.

*Held*, also, that the insertion of the date in the hire receipt was an immaterial alteration.

*Held*, also, that discounting the note was not a waiver of their right of property.

*H. Cameron, Q. C.*, for the appellants.  
*S. Richards, Q. C.*, for the respondents.

*Appeal allowed.*

From Chy.]

[January 16.]

ONTARIO BANK V. SIRR.

*Priority of claims.*

The plaintiffs, who were execution creditors of William Sirr, filed a bill to set aside a conveyance of an equity of redemption from him to his son, Alexander Sirr, as fraudulent and void. The conveyance was set aside, and the decree referred it to the master to take the accounts and declared the lien of Alexander Sirr, *in priority to the plaintiffs' claim*, for whatever he paid to redeem the mortgage and for improvements. In default of payment a sale was ordered, the proceeds to be applied in payment of the amounts found due to Alexander Sirr and the plaintiffs and other incumbrancers in the order of their priority. But in the event of the purchase money being found insufficient to pay the amount found due to the plaintiffs, it was ordered that William Sirr should pay the deficiency; and it was further ordered that the amount of such deficiency, to the extent of the costs taxed to the plaintiffs, should be paid by both the defendants, William Sirr and Alexander Sirr. The land was sold under the decree. Alexander Sirr bought it for \$1,850, but he failed to carry out the purchase. It was afterwards sold a second time, when it produced only \$1,350. The master, by his subsequent report, found due to the plaintiffs for principal, interest and costs, \$1,143.12, of which the sum of \$808.79 was for costs.

*Held*, (Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.) reversing the judgment of the Court of Chancery, that under the circumstances the plaintiffs were entitled to priority over Alexander Sirr for their whole debt and costs, inasmuch as the decree rendered Alexander Sirr liable to pay any part of the amount found due to the plaintiffs, which the purchase money, after paying charges prior to the plaintiffs, was insufficient to cover, provided that said part did not exceed the taxed costs, in which event he was only liable to pay the amount of the costs.

*Guthrie, Q. C.*, and *Foster*, for the appellants,  
*Hamilton*, for the respondents.

*Appeal allowed.*

## QUEEN'S BENCH.

### VACATION COURT.

Harrison, C. J.] [January 15.

NASMITH V. DICKEY ET AL.

*Demurrer—Sci. fa.—R. W. Co.—Shareholders.*

*Demurrer—Sci. fa.* on a judgment recovered by the plaintiff against the T. G. & B. Ry. Co., on the 15th August, 1877, for \$5,582, which was unpaid, and alleging that defendants (J. J. D., N. D., and J. W.) held 30 shares in said Company, on which \$1,800 remained due.

Third plea: That no sum remains due on said 30 shares, inasmuch as one G. H. had recovered a judgment against the R. W. Co., on the 17th February, 1876, for \$1,800, and a *fi. fa.* had been issued and returned *nulla bona*, and thereupon G. H. sued defendants as shareholders of the said Company, and recovered judgment against them for \$1,800, and thereupon defendants paid said G. H. the sum of \$1,800 in full of said judgment, and the amount remaining due on said shares, and that the said 30 shares are wholly paid up.

Replication that G. H. in said action was only trustee for defendant N. D., and had no beneficial interest in said action, of which defendant had notice.

*Held*, that the replication was good; that the claim of N. D. as a creditor of the Company, he being also a shareholder of the Company, could not be set up to defeat the claim of an outside creditor.

*J. K. Kerr, Q. C.*, for the demurrer.

*Richards, Q. C.*, *contra*.

Harrison, C. J.] [January 15.

RE COLLINS & WATER COMMISSIONERS OF OTTAWA.

35 Vict., cap. 80. O. Award—Excessive damages—*Extra vires*.

Two arbitrators (out of three, the third dissenting), appointed under 35 Vict., cap. 80. O., by the County Court Judge, awarded the plaintiff, for land taken for the purposes of the Commissioners, and for damages caused by such taking and otherwise, \$2,000, and interest on that sum at 6 per cent from the date

of a by-law of the Commissioners appropriating the land.

*Held*, that under the statute named, the arbitrators had power to award damages beyond the value of the land.

*Held*, also, that the value of the land found by the arbitrators could not be interfered with by the Court, where the sum was not so excessive as to cause an inference of legal misconduct.

*Held*, also, that interest was properly charged as stated above.

And, *held*, that the award of two out of three arbitrators was valid.

*J. K. Kerr, Q. C.*, for the applicants, the Water Commissioners.

*T. Langton*, for Collins.

## COMMON PLEAS.

### VACATION COURT.

Harrison, C. J.] [January 11.

BANK OF TORONTO V. McDougall.

*Bill of exchange—Consideration—Foreign law.*

Action against defendant as acceptor of a bill of exchange drawn on him by McC. and McK., and payable with plaintiffs.

Plea, in substance, that the bill was drawn, accepted, &c., to raise money for the purpose of carrying on gambling contracts and speculations on the rise and fall of pork in Chicago, in the State of Illinois, which said contracts, by the law of the said State, are illegal and void; and that there never was any other consideration for the said bill than the said illegal consideration as aforesaid, of all of which, McC. and McK., at the time they drew, and the plaintiffs, at the time they became the holders, had notice. There was another plea similar to the fifth, except that it alleged that McC. and McK. paid the bill at maturity, and that the plaintiffs are suing for and on behalf of the said McC. and McK.

HARRISON, C. J., *held* both pleas bad, as the alleged gambling contract was not illegal by the law of this country; and it was no defence that it was illegal by the law of a foreign country.

## DIGEST OF ENGLISH LAW REPORTS.

## ENGLISH REPORTS.

## DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH AND APRIL, 1877.

ADMINISTRATION.—See EXECUTORS AND ADMINISTRATORS.

ANTENUPTIAL AGREEMENT.—See MARRIAGE SETTLEMENT, 2.

## APPOINTMENT.

K. gave a life estate to his daughter M., with power of appointment in M. among her "children," and in default of appointment to all her children equally. M. appointed to two daughters, one of whom was illegitimate and could not take. *Held*, that the other took one half, and the other half went to her and the other legitimate children of M. equally.—*In re Kerr's Trusts*. 4 Ch. D. 600.

ASSETS.—See BANKRUPTCY.

ATTESTATION.—See WILL, 1.

ATTORNEY AND CLIENT.—See LIEN.

## BANKRUPTCY.

1. B., a wine-merchant, in 1857, undertook to marry W., his deceased wife's sister, and they lived together from that time. In 1876 B. went into liquidation, and W. filed her proof for £3,000 "for money lent, advanced, and paid" by her to B. in 1858. The evidence was, that it was agreed that B. should use the money in his business, but that for £2,000 thereof he should be a trustee for W., and that a settlement should be executed. This was, however, never done. *Held*, that W. could not prove her claim as against other creditors. They must first be paid in full.—*In re Beale*. *Ex parte Corbridge*, 4 Ch. D. 246.

2. M. informed B. that he had forged his name on a note for £100; that the note was just due, and he could not pay it; that if B. would pay it, and thus save M.'s family from disgrace, he would give B. a bill of sale for all his effects for this £100, and another like sum, which he owed B. before this transaction. B. accepted the bill of sale, and paid the note on which M. had forged his name. Subsequently M. became bankrupt, and in a suit by the trustee in bankruptcy against B. for the proceeds of the goods sold him by M., *held*, reversing the decision of the Chief Judge, that there had been no offence against the bankrupt law, however the transaction might have affected B. in a suit where he was plaintiff, and that the trustee could not recover.—*In re Mapleback*. *Ex parte Caldocott*, 4 C. H. D. 150.

See COMPOSITION; FRAUDULENT PREFERENCE; PARTNERSHIP.

## BEQUEST.

1. Will in the following words: "I . . . bequeath to G. all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to H. . . . The servants . . . to have £10 and clothes divided among them. Also all kitchen utensils." The testatrix had money and much other personal property besides that specified in the will. *Held*, that the will covered all the personal property of the testatrix.—*King v. George*, 4 Ch. D. 435.

2. Testator bequeathed all his remaining property after bequests, to his wife, "for" her "to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please." *Held*, that there was no precatory trust created thereby.—*In re Bond*. *Cole v. Hawes*, 4 Ch. D. 238.

## BILL OF LADING.

A bill of lading recited that a cargo of feathers and down was shipped on board at St. Petersburg, "in good order and condition, . . . to be delivered in the like good order and well-conditioned" in London. There was the usual list of excepted perils, and in the margin the words, "Weight, contents, and value unknown." The goods coming out damaged in London, the consignees sued the ship, and it was proved that the damage was recent, and that it appeared to come from without and not from within. *Held*, that in spite of the marginal note the bill of lading was evidence that the goods were externally in good order when taken on board; that thus a *prima facie* case was made out, which it was for the defendants to upset by positive evidence of inherent defects in the goods.—*The Peter der Grosse*, 1 P. D. 414.

BILLS AND NOTES.—See EMBEZZLEMENT, 2; NEGOTIABLE INSTRUMENT.

BOND.—See COLLISION, 3.

## BOTTOMRY BOND.

A master has no authority to give a bottomry bond on the ship, or hypothecate the cargo, without sending word to the owners of the necessity thereof, if communication is possible.—*Kleinwort, Cohen & Co., v. The Cassa Marittima of Genoa*, 2 App. Cas. 156.

## BROKER.

P., a broker, in a contract for butter, delivered bought and sold notes to the plaintiff and to the defendant. He signed the first, but not the second; and he made a note of the transaction in his note-book,

## DIGEST OF ENGLISH LAW REPORTS.

and signed it. The defendant kept the broker's note till called upon to accept the goods, when he objected, on the ground that the note was not signed. *Held*, that the defendant was bound by the sold note, that he virtually admitted that the broker had authority to act for him, by his giving no reason for repudiating the bargain but the fact that the broker did not sign the note, and that the memorandum in the broker's book was sufficient to take the sale out of the Statute of Frauds.—*Thompson v. Gardiner*, 1 C. P. D. 777.

See FRAUDULENT PREFERENCE; PRINCIPAL AND AGENT, 1.

BURDEN OF PROOF.—See BILL OF LADING.

CARGO.—See CONTRACT, 4.

CARRIER.—See COMMON CARRIER.

## CHARTER-PARTY.

Charter-party by plaintiff for the ship C for twelve months from the completion of her present voyage. When the C. got in she was declared unseaworthy, and it took two months to repair her. *Held*, that the charter-party could be thrown up by the plaintiff, time being of the essence of the contract.—*Tully v. Howling*, 2 Q. B. D. 182.

See DAMAGES, 2.

CHECK.—See EMBEZZLEMENT, 2.

## CLASS.

S. by will gave estate in trust for all his children, "who being a son or sons have attained or shall attain twenty-one years, or being a daughter or daughter or daughters have attained that age or been married, or shall attain that age or be married," the sons' shares to be for their own absolute use and benefit. The daughters' shares were to be held for their separate use during their lifetime, and after for their children. In case a son died in testator's lifetime leaving children, the children, the children took in place of the father. There was no such provision in case of a daughter's predecease. A daughter died in the testator's lifetime leaving children. *Held*, that these children were entitled to their mother's share under the will.—*In re Speakman*. *Unsworth v. Speakman*, 4 Ch. D. 620.

See CONSTRUCTION, 2; DEVISE.

CODICIL.—See WILL, 1.

## COLLISION.

1. Action by skiff E. against steamer C. for injury to the E., caused by alleged negligence of the C. in colliding with the E., while the C. was coming into the dock and the E. was lying inside. On the evidence, *held*, that the C. was to blame.—*The Cynthia*, 2 P. D. 52.

2. Collision between the bark O. and the steamer P. in the Tyne. The P. was properly moored, but was run into during a gale by a brig adrift in the river. In consequence one of the rings of the buoys gave way, and the P. drifted, and struck and damaged the O. as she was lying moored. No lookout was posted on the P., though the weather was growing boisterous, and it was shown that her chain cables were unbent. *Held*, on the evidence, that the steamer was alone to blame.—*The Pladda*, 2 P. D. 34.

3. In a suit for wages and disbursements between a master and a mortgagee of a ship, the court refused to retain in court a sum of money sufficient to satisfy a certain bond (in case it should ever be presented), which the master had given to release the ship after a collision happening from his neglect.—*The Limerick*, 1 P. D. 111.

See DAMAGES, 2.

COMITY.—See JURISDICTION, 1.

## COMMON CARRIER.

Plaintiff took a ticket from Boulogne to London over defendants' steamboat line and railway. On the ticket it was stated that each passenger was allowed 120 pounds of luggage free, and that the company was responsible for no more than £6 value. Plaintiff's box was damaged through negligence of defendants' servants to the amount of £73. By the Railway and Canal Traffic Act of 1854, § 7, it is provided that railway companies shall be liable for loss arising from their negligence in the carriage of goods, notwithstanding any notice of non-liability they have given—and the passengers' luggage taken free of charge is included in the statute. *Held*, that the plaintiff could recover.—*Cohen v. The South Eastern Railway Co.*, 2 Ex. D. 253.

COMPOUNDING FELONY.—See BANKRUPTCY.

CONDITIONS AT SALE.—See CONVEYANCE.

CONSIDERATION.—See BANKRUPTCY.

## CONSPIRACY.

Second count in an indictment for conspiracy to defraud: That defendants, promoters of the E. Company, Limited, applied to the Stock Exchange Committee for leave to have the E. Company put on the list of quotations of the Stock Exchange, under two rules of the Stock Exchange, Nos. 128, 129. These rules provide that a new company would be quoted when two-thirds of the whole nominal capital had been applied for and unconditionally allotted to the public; and a member of the Stock Exchange was authorized by the company to give information con-

## DIGEST OF ENGLISH LAW REPORTS.

cerning it, and was able to satisfy all the requirements of the committee. That defendants employed brokers to give the information required, and to make application to the committee to quote the shares; that the defendants employed the brokers to sell on behalf of certain pretended vendors of patents 5,000 shares of the stock, and conspired unlawfully to injure and deceive the committee by inducing them to order said quotation, and thereby to persuade Her Majesty's liege subjects to purchase said shares, by making them think that the company had complied with the rules of the Stock Exchange. That they falsely pretended to Z. and other members of the committee that 34,365 shares had been applied for by the public, and the amount received therefor was £17,282; that 15,000 shares had been allotted to the patentees, and none allotted conditionally; and that by means of the premises they induced the committee to order the quotation. *Held*, that a verdict of guilty of conspiracy under this count must be sustained, though the allegations were very inaccurately stated.—*The Queen v. Aspinall*, 2 Q. B. D. 48.

## CONSTRUCTION.

1. H. F. died in 1819, leaving a will dated in 1814. In it he devised real estate to R. S., second son of Sir T. S., for life, remainder to R. S.'s first and other sons in tail male, remainder to J. S. and C. S. younger sons of Sir T. S., in tail male. In case the said R. S., J. S., or C. S. "shall become the eldest son of the said Sir T. S., then and in such case, and so often as the same shall happen," the estate so devised to cease and determine as though "the person so becoming the eldest son of said Sir T. S. was then dead without issue male." C. S. died, childless, in 1834. Sir T. S. died in 1841, and his eldest son succeeded to his titles. He died, childless, in 1863, and the second son, R. S., succeeded. He died in 1875, without issue male. In an action by the testator's right heirs for the estate as against J. S., *held*, that J. S. had become "the eldest son of Sir T. S.," within the meaning of the will, and was thereby disentitled.—*Hervey-Bathurst v. Stanley*. *Craven v. same*, 4 Ch. D. 251.

2. Testator gave to trustees a fund of £66,666 13s. 4d. upon trust to pay £1,000 a year, being the interest of one-half, to his daughter A. B., and the like to his daughter E. B., during their lives; and, after the decease of either daughter, "I give . . . the said £33,333 6s. 8d., . . . being such daughter's share, unto and among all and every such child or children she may happen to leave at her decease, to be equally divided between them when and as they shall respectively attain the age of twenty-

one years, and if but one child, then to such child; and in case either of my said daughters shall die without issue, then I direct that" her share shall be transferred by the trustees as said daughter should by will appoint. A. B. had a daughter who married, and died in 1869, leaving five children, who are all now living, and are all over twenty-one. A. B. died in 1876, having made a will, in which she exercised the power of appointment given in her father's will in case she should "die without issue." *Held*, that the power was properly exercised, "issue" meaning children of the tenant for life.—*In re Mercer's Trusts*. *Davis v. Mercer*, 4 Ch. D. 182.

See BEQUEST, 1, 2; CLASS; CONTRACT, 4; DISTRIBUTION; LEASE; MARRIAGE SETTLEMENT, 1, 2; TRUSTEE, 1, 2.

## CONTRACT.

1. Contract by defendants to buy from plaintiffs 600 tons of rice, to be "shipped" at Madras in the months of March (*and or*) April, 1874, per ship *Rajah*. 7,120 bags of rice were put on board the *Rajah* between the 23rd and 25th of February, and the three bills of lading therefor were signed in February. Of the 1,080 remaining bags, 1,030 were put on board Feb. 28, and the rest March 3, and the bill of lading for the 1,080 bags bore the latter date. There was evidence that rice put on board in February was as good as that put on board in February was as that put on board in March or April. *Held*, that the defendants was bound to take the rice. The word "ship" construed.—*Shand v. Bowes*, 2 Q. B. D. 112.

2. By 8 & 9 Vict. c. 109, § 18, "agreements by way of gaming or wagering" are void. Plaintiff was a "tipster" (i.e. one who gave advice on the probable winning horse), and the defendant agreed that plaintiff should lay out £2 in betting on a horse R. in a steeple-chase, at odds of 25 to 1. If R. won, plaintiff was to have £50 from defendant out of his winnings if he backed R. If R. lost, plaintiff was to pay defendant £2. Defendant backed R., R. won, and defendant made on his bets £250. Of this, plaintiff claimed £50. *Held*, that this arrangement came within the statute.—*Higginson v. Simpson*, 2 C. P. D. 76.

3. Oct. 31, 1874, the C. company made a contract with the P. company to sell the P. company 2,500 tons iron, to be delivered in monthly instalments over ten months, "payments by four months' bill net, or cash less 2½ per cent. discount, on the 10th of the month next following each delivery," Nov. 4, 1874, a second contract was made for 2,500 tons during the next ten months, for cash on the 10th of the month following delivery, with the same discount. Jan. 11,

## DIGEST OF ENGLISH LAW REPORTS.

1875, another similar contract was made. Feb. 24, 1875, after deliveries had been made under the first and second, but none under the third, contract, the P. company called a meeting of its chief creditors, including the C. company, and asked for an extension, saying the business was going on at a loss. It was refused; and the C. company refused to deliver more iron except for cash; whereupon the P. company wrote to rescind the contracts; but there was no evidence that the C. company got the notice. The P. company managed to get along until May, 1875, when its affairs became so bad that, June 9 following, voluntary winding-up proceedings were begun. The C. company claimed to prove as creditors for £2,738 for breach of the three contracts. *Held*, that the claim should be disallowed, on the ground that there was no such insolvency, or declaration of insolvency, on and after Feb. 24, as to authorize the C. company to refuse to deliver the iron except for cash.—*In re Phoenix Bessemer Steel Company. Ex parte Cornforth Hematite Iron Company*, 4 Ch. D. 108.

4. Defendants bought of plaintiffs "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum, . . . to be shipped from New York during the last half of February next, and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive (buyer's option)." Plaintiffs shipped 3,000 barrels, consigned by bill of lading to defendants. To fill up the ship they put on board 300 barrels more, marked in a different way and under another bill of lading. Plaintiffs gave notice of the shipment, offering to conform to the contract as to calling for orders and port of landing, and to deliver either 3,000 or 2,750 barrels to defendants there, and take the balance themselves. Defendants refused to accept any. *Held*, that defendants were not bound to accept any, the contract having been for a "cargo," and cargo signifying all a ship carries.—*Borrowman v. Drayton*, 2 Ex. D. 15.

See INFANT; PRINCIPAL AND SURETY; SALE; TELEGRAPH; VENDOR AND PURCHASER, 1.

## CONVEYANCE.

Plaintiffs were trustees, and put up the trust estate at auction under this condition, *inter alia*: "The property is sold, and will be conveyed subject to all free rents, quit-rents, and incidents of tenure, and to all rights of way, water, and other easements (if any)." Defendant was the purchaser, and objected to the insertion of the above words in the conveyance. *Held*, on claim for specific performance, that defendant was

bound to accept the conveyance in the above form.—*Gale v. Squier*, 4 Ch. D. 226.

## COPYRIGHT.

Defendant wrote a play, in which it was found as a fact that he took two "unimportant" "scenes or points" from a play of the same name belonging to plaintiff. *Held*, that, under the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15, § 2, the defendant was not liable.—*Chatterton v. Cave*, 2 C. P. D. 42.

## COVENANT.

A covenant not to carry on a trade within certain limits is broken by the covenantor's selling goods as a journeyman within the prescribed limits, for a third party carrying on the trade in question.—*Jones v. Heavens*, 4 Ch. D. 636.

## CUSTODY OF CHILD.

Custody of a boy three years old given to the mother, who had been deserted by her husband, father of the child. 36 & 37 Vict., c. 12.—*In re Taylor, an Infant*, 4 Ch. D. 157.

## DAMAGES.

1. Action under sect. 6 of the Admiralty Court Act, 1861 (24 Vict., c. 10), by the assignee of a bill of lading, to recover damages for delay in the delivery of the cargo. The liability was admitted, and the question of damages was referred to the registrar. He reported that interest at five per cent. on the value of the invoice from the time when the cargo should have been delivered, and the time of its actual delivery, was the proper measure of damages; but he found as a fact that the market value of the goods had fallen during that time. *Held*, that he should have included in the damages the difference in market value.—*The Parana*, 1 P. D. 452.

2. In a suit for damages resulting from collision, the ship in fault acknowledged the liability, and the question of damages was referred to the registrar. He refused to allow as an item of damage the loss of a charter-party by the vessel injured, resulting from the delay caused by the collision. *Held*, that the loss of the charter-party must be taken into the account in estimating the damages.—*The Star of India*, 1 P. D. 469.

## DEED.

The manager of a bank, which had already made advances to and taken mortgage securities therefor from one B., agreed to make further advances on further security being tendered; and B. thereupon pointed out to him three houses on C. road, which he would give as security subject to a prior mortgage. In pursuance of this ar-

## DIGEST OF ENGLISH LAW REPORTS.

rangement, an instrument was executed by B. to the bank, in which the three houses were described as conveyed in leasehold to B. by one L., "by indenture dated the 25th of September, 1874." In fact, only one of the three was comprised in that lease, the other two having been conveyed by lease to B. by L., Dec. 31, 1874. B. went into liquidation; the three houses were sold by the first mortgagee, and a sufficient sum remained out of the proceeds of the sale to pay the whole claim at the bank. *Held*, that the bank was entitled to the amount of its claim out of the proceeds of the three houses.—*In re Boulter. Ex parte National Provincial Bank of England*, 4 Ch. D. 241.

## DEVISE.

C. devised five houses to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime leaving issue living at my death, in equal shares as tenants in common." Subsequently by codicil it was recited that some of the children of J. C. had lately died without issue; the previous devise of the five houses was revoked, one of the houses was given to another devisee, and the remaining four devised to J. C.'s children in the precise words previously used in the will. J. C. had four children living at the testator's death, and one had died during the life of the testator leaving children. *Held*, that the four children of J. C. living at the testator's death took the whole of the four houses, as members of a class.—*In re Coleman & Jarrom*, 4 Ch. D. 165.

## DISTRIBUTION.

Testator gave £10,000 in stocks to trustees, to pay £7,500 to certain of his grandchildren named, and the interest on the £2,500 to be paid to M. B. for life, and after his death the sum itself to be paid to the children of J. B., daughter of the testator, deceased, or their descendants; but should there be none of them surviving, "then it should be divided amongst such other grandchildren as I may then have living, or in default thereof to my legal representative." J. B. had seven children, three died unmarried in the lifetime of the testator. One of the four survivors survived the tenant for life, and one only of the three, so dying before the tenant for life, left issue. *Held*, that the children of J. B. who survived the testator, or their representatives, were the persons entitled to take.—*In re Dawe's Trusts*, 4 Ch. D. 210.

DOMESTIC RELATIONS.—See CUSTODY OF CHILD; DOWER; MARRIAGE SETTLEMENT, 1, 2.

## DOWER.

Mortgage in the ordinary form, with power of sale by D., with release of dower by wife, made Dec. 24, 1846. Nov. 3, 1854, D. made a second mortgage in similar form, but conveying "freed and discharged of and from all right and title to dower" on the part of his wife, and subject to the mortgage of Dec. 24, 1846. Dec. 4, 1858, the second mortgagees paid the first mortgagee, and took a conveyance of the premises from the latter, subject to the equity of redemption in the first mortgage. In October, 1860, default was made on the second mortgage, and the mortgagees sold the property. Nov. 24, 1874, D. died, and Oct. 14, 1875, his wife filed her bill against the mortgagees for the value of her dower in the equity of redemption sold by them. D. and his wife were married before the Dower Act. *Held*, that she was entitled.—*Dawson v. Bank of Whitehaven*, 4 Ch. D. 639.

EASEMENT.—See WAY.

## EMBEZZLEMENT.

1. Indictment under 24 & 25 Vict., c. 96, § 75. Prisoner was an insurance broker, and received in the latter part of December the amount of two policies sent to him for collection by the prosecutor. The amounts were sent him by checks to his own order, and he placed the checks to his own credit in his own bank. He was pressed for the money by the prosecutor, and made excuses for not paying it over at once. January 27 following he filed a petition in bankruptcy, and his balance at his bank turned out to be much less than the amount of the said checks. *Held*, that on these facts a conviction, "for that he being a broker, attorney, or agent, was intrusted with securities for a particular purpose, without authority to sell, negotiate, transfer, or pledge them, and that he unlawfully, and contrary to the purpose for which said securities were intrusted, converted a part of the proceeds thereof to his own use," could not be maintained.—*The Queen v. Tatlock*, 2 Q. B. D. 157.

2. The prisoner was clerk of the L. Insurance Company, and was in the habit of opening letters and receiving remittances, which he handed to the cashier, an officer under himself. If checks were sent, it was his duty to endorse them as though payable to his own order, and hand them to the cashier, who deposited them to the credit of the company, and accounted for them in his own books. Prisoner received two checks in payment of dues to the company, payable to his own order. Instead of indorsing these in the usual way, and passing them to the cashier, he got the money on them from



## DIGEST OF ENGLISH LAW REPORTS—LAW STUDENTS' DEPARTMENT.

private friends, and turned it over to the cashier in payment of an overdraft of his salary, which he had made, and for which he had given his I. O. U's. The cashier supposed the money was the prisoner's and gave him back the I. O. U's. *Held*, on an indictment for embezzling the "proceeds" of the checks, that the transaction constituted a case of embezzlement, and that the conviction must stand.—*The Queen v. Gale*, 2 Q. B. D. 141.

ESTOPPEL.—See NEGOTIABLE INSTRUMENT.

EVIDENCE.—See DEED; EMBEZZLEMENT, 1; NEGLIGENCE, 1, 2.

## EXECUTORS AND ADMINISTRATORS.

1. Letters of administration *ad colligenda bona* were granted to a creditor on the estate of a schoolmaster, whose next of kin were unknown, and the school interest was likely to suffer and decrease in value from the delay to happen in the appointment of a regular administrator.—*In the goods of Schwerdtfeger*, 1 P. D. 424.

2. The business of a trader was carried on by his executrix, who was residuary legatee, after his death, as her own. *Held*, that she could not be considered a trustee for her husband's creditors with respect to the assets of the business, and that they passed on her marriage to her second husband.—*In re Fells*. *Ex parte Andrews*, 4 Ch. D. 509.

## FIXTURES.

Leasehold property was demised to E., a timber merchant. Lessee covenanted that he would build a steam saw-mill or dwelling-houses; that he would keep the same in repair, and at the end of the demise deliver to the lessor the ground and buildings, and all fixtures and other things whatsoever which should be fixed to the freehold, in good repair, &c., except the steam saw-mill, apparatus, machinery, fixtures, and things connected therewith, which the lessee had liberty to remove. E. subsequently mortgaged his interest, including the ground and premises named in the lease, "together with the steam saw-mill, offices, erections, and buildings, and which have been erected . . . upon the said . . . ground; and the steam-engines, boilers, fixed and movable machinery, plant, implements, and utensils now or hereafter fixed to or placed upon or used in or about the said grounds. . . . To have and to hold the said hereditaments, and such of the machinery, plant, utensils, and premises . . . as are in the nature of landlord's fixtures, and cannot lawfully be removed by the lessee," to the mortgagee for the balance of the term, "and as to the rest of the said machinery and premises as are in the nature of the tenant's or trade

fixtures, and can lawfully be removed by the lessee thereof," to the mortgagee absolutely. The deed was not registered. E. went into liquidation, and the mortgagee had not entered. *Held*, that the deed gave the mortgagee the right to remove the trade fixtures, specified, and as the mortgage had not been registered under the Bills of Sale Act, the official liquidator was entitled to the severable property.—*In re Belick*. *Ex parte Alexander*.

FORECLOSURE.—See MORTGAGE AND MORTGAGEE, 3.

## FOREIGN JUDGMENT.

The Italian bark E. F. brought suit against the French steamship D., in Marseilles, for collision. The D. began a cross-suit there for the same cause. The D. got judgment in both suits by default. In a suit in England by the E. against the D. for the same cause, the D. pleaded the foreign judgments by default, in bar.—*Held*, that the defence was not good.—*The Delta*. *The Erminia Foscolo*, 1 P. D. 393.

FRAUDS, STATUTE OF.—See STATUTE OF FRAUDS.

(To be continued.)

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

FOR CALL, MICHAELMAS TERM, 1877.

*Dart's Vendors and Purchasers—Walkem on Wills—the Statutes.*

1. A trustee purchases the trust estate, consisting of lands, under such circumstances that the purchase is voidable by the *cestui que trust*, and makes some permanent improvements. State fully the alternative rights of the *cestui que trust*.

2. What (if any) distinction is there between natural and artificial watercourses, as to rights which may be acquired by user? Give an illustration.

3. Under what different circumstances will time be held to be of the essence of a contract for sale and purchase: (1) at law; (2) in equity?

4. What are and what are not sufficient acts of part-performance to take an agreement out of the Statute of Frauds: (1) in case of an agreement for sale of lands; (2) in case of an agreement for a new lease to a tenant in possession?

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

5. A in some way injures the real estate of B. Shortly afterwards B dies. Can any action be brought against A, if so, under what circumstances and by whom? To whom would the damages belong?

6. What was the reason for, and the effect of, the statute declaring that corporations should be deemed to be capable of taking and conveying land by a deed of bargain and sale?

7. What is the provision in the statute relating to the assurance of estates tail for the meeting in one person of a base fee and the reversion? Show the necessity for such a provision. Why did the statute not extend to the case of an actual tenant in tail acquiring the reversion?

8. A contracts to sell lands to B. Before the conveyance A dies intestate, leaving a widow and some infant children. How would you advise B to proceed to complete his purchase?

9. A by his will devises certain mortgaged lands to B, and directs that all his debts should be paid out of his personal estate. The mortgagee obtains payment by action on the covenant out of the personality. On the executors consulting you with reference to the estate generally, to what statutory provisions would you direct their attention?

*Taylor on Evidence.*

1. State the distinction between disputable presumptions of law and of fact.

2. What is meant by a "direct" and a "collateral" issue; and how far may the answers of a witness be contradicted in each case?

3. What are the exceptions to the rejection of hearsay evidence?

4. Is the discretion of a Judge in refusing amendments at the trial final? and what are the provisions of the late Ontario Acts respecting such amendments?

5. What is the rule as to the admissibility of dying declarations, and to what cases are they limited?

*Leake on Contracts.*

1. What is merger, and upon what does it operate?

2. What are contracts by agents arising from necessity?

3. Give a sketch of the Ontario law respecting written promises as to actions (1) of debt for arrearages of rent, (2) against

joint contractors, and (3) respecting representations concerning the character or credit of third parties.

4. What is the effect in law and in equity where a written contract is waived or varied by parol?

5. Give examples of contracts illegal by statute.

*Blackstone, Vol. I.*

1. What is the right of personal security for life, and when does the right begin?

2. Illustrate what is meant by the maxim "The King can do no wrong," and state in what way has the constitution allowed a latitude of supposing the contrary.

3. Illustrate the distinction between persons natural and persons artificial.

4. Give the rules for interpretation of statutes.

5. What are the absolute rights of individuals, and by what means are these rights protected?

6. How may corporations be dissolved?

*Stephens on Pleading—Byles on Bills—Common Law Pleading and Practice, and the Statute Law.*

1. Define what is meant by "an action of trespass upon the case," and trace the history and origin of this action in English jurisprudence.

2. Where it is alleged, as a breach of a covenant sued on, that a ship was not tight, &c., and fitted for the voyage pursuant to the covenant in that behalf, whereby she was obliged to put back, and by reason thereof was detained. Would a plea, limited to "so much of the declaration as relates to the detaining" be good? If so, why? If not, why not? Discuss fully, giving the rules of pleading relating to the matter in question.

3. What is meant by a plea of "*liberum tenementum*," and to what cases is it applicable?

4. What is a *departure* in pleading, and how can a party take advantage of it?

5. An order is drawn by the owner of a ship to pay £100 on "account of freight," duly stamped as a bill of exchange. What would be the effect of such instrument? Give reason for answer.

6. What course should a holder of a bill of exchange pursue in case the drawee offer a qualified acceptance?

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS—CORRESPONDENCE—REVIEWS.

7. In how far is the production of a bill of exchange from the custody of the acceptor evidence of his having paid it.

8. Where, by the law of a foreign country, the Statute of Limitations concludes a person from recovering on a note when five years overdue, and a note made in that country is sued on in Canada five years and six months after maturity, can any, and, if so, what, advantage be taken of the foreign Statute? Explain fully, giving reasons for your answer.

9. In case of a demurrer to a replication where you are acting for the plaintiff, what matters would you deem important to consider before taking the next step in the suit? State the different courses which might be pursued, and the considerations which would govern in adopting any of them, giving grounds statutory or otherwise for what you would do?

10. What is the effect of pleading a defence arising after the commencement of an action with other pleas of defences arising before action? State fully the authority for your answer.

## FOURTH YEAR SCHOLARSHIP. MICHAELMAS TERM, 1877.

*Benjamin on Sales.*

1. Where an agent contracts in his own name, is it competent for either (1) agent or (2) party with whom he contracts to shew that the contract was really made with the principal? Give the reasons for your answer.

2. Explain the distinction between "bargain" and "agreement."

3. What are the rules for determining whether the property in goods has passed from the vendor to the purchaser?

4. Explain what is meant by mistake; and state in what cases can contracts, carried into effect under a continuance of mistake, be set aside.

5. What concurrent conditions, in the nature of mutual conditions precedent, must be shewn by a party seeking to enforce a contract?

6. What is meant by a *del credere* commission?

7. Define shortly what is meant by the term "a contract for the sale of a chattel."

*Lectures of the Law Society.*

TO THE EDITOR OF THE LAW JOURNAL:

DEAR SIR.—Allow me a space in the "Students' Department" to say a few words in favour of the country students. Those who are fortunate enough to be in a Toronto office, have the full benefit of these Lectures, which we, as country students, have not. They have the advantage over us. Is there not some way by which we can have the same benefit? For instance, could not these lectures be published in pamphlet form by the Law Society? Almost every student in the Dominion would subscribe. Barristers would do the same. Or, if the Law Society cannot arrange the foregoing, let them publish these Lectures in the LAW JOURNAL, and thereby give us a better chance to compete for Honours and Scholarships as well as a better knowledge of Law. Perhaps the Editor of the LAW JOURNAL will enquire about it.

COUNTRY STUDENT.

## REVIEWS.

THE LEGAL NEWS. Montreal: T. & R. White.

We welcome to the field of legal journalism *The Legal News*, published in Montreal, it rises apparently on the ashes of the defunct *Lower Canada Law Journal*. It is to be issued weekly, the publishers being Messrs. T. & R. White. It seems devoted as much to the commercial as to the legal world of the Province of Quebec. We wish it every success.

## CORRIGENDA.

VOL. XIII, p. 358, in Judgment of MORRISON, J.

Line 2—for "motion" read "motive."

1b. for the comma insert a period.

1b. omit from the word "and" to the fourth word in the next line, inclusive.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR MARCH.

1. Fri..Last day for delivering appeal books.
6. Wed..York changed to Toronto, 1884. Ash Wednesday.
12. Tues..County Court of the County of York begins.
15. Fri..Sittings of Court of Appeal.
23. Sat..Sir Geo. Arthur, Lieut.-Gov. U. C. 1883.
28. Thur..War declared with Russia, 1864.
29. Fri..Russian war ended, 1866.
30. Lord Metcalfe, Gov.-Gen., 1848.

## CONTENTS.

EDITORIALS :	PAGE
The Law School .....	69
Fusion of Law and Equity .....	69
The Revised Statutes of Ontario .....	69
New Trials on Evidence .....	72
Specific Performance.....	74
CANADA REPORTS :	
ONTARIO :	
COMMON LAW CHAMBERS.	
McMaster v. King.	
Notice of Trial—Demurrer—Rehearing. ...	79
NOTES OF CASES :	
Queen's Bench .....	80
Common Pleas .....	83
Chancery.....	84
ENGLISH REPORTS :	
Digest of the English Law Reports for February, March, and April, 1877 .....	89
LAW STUDENTS' DEPARTMENT :	
Examinations, Hilary Term .....	91
Questions, Hilary Term Examinations .....	92
ASSIZES, CHANCERY SITTINGS.....	93
FLOTSAM AND JETSAM .....	94
LAW SOCIETY OF UPPER CANADA .....	95

has been abolished. Several amendments were proposed, in an endeavour to save it in some modified shape, but they were voted down. We hope the Benchers have well considered this matter in the interests of the future welfare of the profession. A great step was supposed to have been gained when the school was established, and much thought and labour was expended upon it. We trust that there was no sectional feeling, or decentralizing idea in the matter, for if so much injury may result, or at least there may be a loss of much possible good.

We have received another letter from "Q. C." on the subject of Fusion. It is in continuation of his argument, and in answer to the letters that appeared taking the other side of the question. We regret that we are compelled, from want of space, to hold it over until next month.

## THE REVISED STATUTES OF ONTARIO.

Since the publication of our previous article on this subject, we have had the opportunity of examining the supplementary volumes issued as appendices to the final report of the Statute Commissioners.

One of these is a collection of "Imperial Statutes affecting the Province of Ontario and consisting chiefly of such Acts as relate to the constitution of the Province and the political rights of its inhabitants;" the other is an incomplete collection which seems to have been originally intended to include such Statutes, whether passed by the Parliament of old Canada or of the Dominion, as are still in force in this Province, but are not within the legislative jurisdiction of Ontario. The only portion of this projected

**Canada Law Journal.**

*Toronto, March, 1878.*

As will be seen by the *Résumé* of the proceedings of Benchers of the Law Society in Convocation, the Law School

## THE REVISED STATUTES OF ONTARIO.

work which is included in the volume before us is the First Part, embracing the following Titles :—(1) Statutes, Form and Interpretation ; (2) Territorial Divisions ; (3) Constitution and Political Rights ; (4) Executive Government and Public Officers ; and, (5) Public Departments, Revenue, and Property. As the Acts printed in this collection relate to subjects within the legislative jurisdiction of the Dominion, consolidation was out of the question, and the aim of the Commissioners has been convenience of arrangement. To this end the Statutes relating to each particular subject, *e. g.* the Militia Acts, have been printed one after another in a series, omitting sections specifically repealed, inserting in italic notes a reference to the authority for each such omission, and indicating also the extent to which the sections which remain have been amended or otherwise affected by subsequent legislation. The work appears to have been carefully done, but there is no attempt at an index, and the system adopted by no means results in clearness and ease of reference when, as in the Act relating to the Representation of the People in Parliament, the text of the original Statute loses itself completely in the abundance of notes which “do but encumber what they would enrich.”

The expediency of publishing for general distribution so small a fragment of the work entrusted to the Commissioners appears to us extremely questionable, but perhaps it is done upon the principle “*ex pede Herculem*,” and we are quite willing to believe that the whole collection had it ever been completed, would have been equal to the specimen submitted in the present volume.

Of the collection of Imperial Statutes included in the second of these volumes, we cannot speak so highly. From the inscription on the title-page, we learn

that it was prepared by Messrs. G. H. Watson and G. L. B. Fraser, barristers-at law, under the direction of a Committee of the Statute Commissioners.

Knowing the composition of the Commission to have been chiefly judicial, we criticise with great deference, but it occurs to us first that a much more systematic arrangement of the Statutes dealt with would have been possible. We miss altogether from this volume the helps afforded in all the others by the scheme of classification printed at the beginning not only of each volume, but of each title, and even at the head of every Act, and the only key to the somewhat heterogeneous collection is an index at the end, and a short list of Acts at the beginning. From these we learn that of the 346 pages included in the volume, 204 are taken up by the Merchant Shipping Acts, 39 by the British North America Act of 1867—which, by the way, also appears, properly enough, in Vol. I of the Revised Statutes—and some 50 pages at the end of the volume, by the Acts respecting Naturalization, Extradition and Foreign Enlistment. In these last pages the want of arrangement is painfully manifest, the B. N. A. Act, 1867, being given at pp. 246 to 284, inclusive, and the amending Acts of 1871 and 1875 inserted at p. 331 and p. 346 respectively, interspersed among several short Statutes relating to Naturalization, Extradition, and Foreign Enlistment, in “most admired disorder,” and without any note or cross-reference to aid the bewildered inquirer.

But by far the most important defect is the entire omission from the work of many if not most of the very Statutes which most imperatively require republication in order to be readily accessible both to lawyers and laymen.

It is evident from the title of the collections as well as from the very small

## THE REVISED STATUTES OF ONTARIO.

space, scarcely one fifth of the volume, which is not filled up by the Act above referred to, that many very important Imperial Statutes must be conspicuous by their absence. No portion of the Statutes of Frauds, for example, has found a place in the collection, although it seems to us that some of the sections are at least as important as most of the Acts which have been selected for publication. The Statutes which regulate the distribution of the personal property of intestates are not introduced. These are, however, easily accessible through the medium of the *Canada Law Journal* Almanack, but might well appear in the volume before us. The Imperial Copyright Act of 1842 (5 and 6 Vict., cap. 45) though held in *Smiles v. Belford* to be still in force in Canada, has been omitted, while the less important amending Act of 10-11 Vict., cap. 95, is inserted at length, and even of those Imperial Acts which are incorporated by reference into our own legislation only one seems to have been printed, as will appear from the following list:—

3-4 Vict., c. 78, referred to in R. S. O., c. 28, s. 9, is omitted.

21 Hen. VIII., c. 5; 22-23 Car. II., c. 10, and 1 Jac. II., c. 17, referred to in R. S. O., c. 46, s. 60, are omitted.

8 Anne, c. 14, referred to in R. S. O., c. 47, s. 211, is omitted.

8-9 Wm. III., c. 11, referred to in R. S. O., c. 50, s. 332, and R. S. O., c. 53, s. 12, is omitted.

9 Anne, c. 20, referred to in R. S. O., c. 52, s. 11, is omitted.

21 Jac. I., c. 16, s. 8, referred to in R. S. O., c. 61, s. 4, and R. S. O., c. 117, ss. 1, 2, 5, 6, 7, is omitted.

13 Eliz. c. 5, ss. 1, 2 and 6, referred to in R. S. O., c. 95, s. 13, is omitted.

11 Hen. VII., c. 20, referred to in R. S. O., c. 100, s. 4 is omitted.

22-23 Car. II., c. 10, and 29 Car. II.,

c. 3, referred to in R. S. O., c. 105, s. 36, is omitted.

29 Car. II., c. 3, s. 17, referred to in R. S. O., c. 117, s. 11, is omitted.

32 Hen. VIII., c. 9, ss. 2, 4, 6, referred to in R. S. O., c. 180, s. 158, is omitted.

31 Geo. III., c. 31, referred to in R. S. O., c. 215, s. 3, is printed.

Some of these Statutes, indeed, are embodied in our own legislation, as for example those, or most of those, which relate to the limitation of actions. Others, as the 11 Hen. VII., c. 20, are but incidentally referred to, and one, the 13 Eliz., c. 5, in reference to fraudulent conveyances, was reprinted by Mr. Blake as the preamble to his Act of 35 Vict., c. 11, declaring the meaning of the Statute of Elizabeth. Except in these cases the Acts above referred to, which are indeed part of the Statute Law of Ontario, should, we think, have, in some way, found a place on the Statute Book, and if the present volume was not intended to include them, we trust the Government will not give up the work of consolidation until these Imperial Statutes have been placed within the reach of all those who are subject to their enactments.

The practical use of Volumes I. and II. shows the arrangement of the Index to be defective. At the end of Volume II. is an Index of the whole revision. There should be a separate Index to each volume, or better still a duplicate Index of the whole to each Volume, after the manner of the Consolidated Statutes.

In our previous remarks on the subject of this revision, we omitted to mention the name of Mr. C. R. W. Biggar as having been one of the Commissioners who prepared the Draft Revised Statutes submitted to the House last Session.

## NEW TRIALS FOR IMPROPER RECEPTION OR REJECTION OF EVIDENCE.

NEW TRIALS FOR IMPROPER  
RECEPTION OR REJECTION  
OF EVIDENCE.

It is necessary that evidence be pertinent to the issue or issues being tried; and, where the tribunal for the trial of the issue or issues is a jury, great care is required as to the evidence which ought to be submitted for their consideration.

It is of course the duty of the presiding judge in the first instance to decide all questions as to the admissibility of testimony. If he be wrong, either in the reception or rejection of testimony, the ordinary remedy is an application to the Court in which the cause is pending for a new trial.

But new trials are not ordered in every case of testimony wrongfully received or rejected. The practice on this head is now well understood; and it will be our object in what follows to expound as concisely and clearly as possible the practice as we understand it.

The granting of a new trial is a matter of discretion in the Court, a discretion indeed not to be exercised capriciously; but, in the absence of legislation, according to the rules and practice of the Court, gathered from decisions of the Courts. The decisions deal with the improper reception of evidence and the improper rejection of evidence as grounds for new trials, as governed in some degree by similar principles.

In *Horford v. Wilson*, 1 Taunt. 12, 14, Mansfield, C. J., said: "Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury."

In *Doe d. Teynham v. Tyler*, 6 Bing. 561, 563, Tindal, C. J., said: "It has been contended, that we are to analyse

the evidence by a difficult process and to discriminate the precise effect produced on the mind of the jury on each portion of the proof; but we have a much plainer course, and that is, to hear the report of the trial and to sustain the verdict, if we are satisfied that there is enough to warrant the finding of the jury independently of the evidence objected to."

But in *Baron de Rutzen v. Farr*, 4 A. & E. 53, the Court laid down the rule that where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party, unless they see clearly that the improper evidence could not have weighed with the jury or that the verdict if given the other way would have been set aside as against evidence.

In *Wright v. Doe d. Tatham*, 7 A. & E. 313, 330, Denman, C. J., referring to the foregoing case said: "We need not repeat our reasons for holding that, wherever evidence formally objected to at *Nisi Prius* is received by the judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial."

Hence where improper evidence has been received, a new trial will be ordered although the jury accompanied their verdict with a distinct and positive statement that they have reached a conclusion without reference to the obnoxious evidence: *Bailey v. Haines*, 19 L. J. Q. B. 73, 78.

The latest decision on the subject, notwithstanding some differences of opinion among the judges, is in accordance with the more recent exposition of the practice above mentioned, see *Hodson v. The Midland Great Western Railway Co.*, L. R., 11 Ir. C. L. R. 109.

Two exceptions appear to be established. These are:

## NEW TRIALS FOR IMPROPER RECEPTION OR REJECTION OF EVIDENCE.

1. Where the fact in dispute is proved otherwise than by the obnoxious evidence : *Stindt v. Roberts et al.* 5 D. & L. 460 ; 12 Jurist 518 ; 17 L. J. Q. B. 166).

2. Where the evidence was improperly received to explain a supposed latent ambiguity in a written document which the Court must itself construe without reference to the finding of the jury : *Bruff v. Conybeare*, 13 C. B. N. S. 263.

The ground on which new trials are ordered on account of the rejection of evidence relative to the issue is that the Court cannot weigh the degree of relevancy, or say what effect any fact that is relevant would have had on the minds of the jury.

In *Tyrrohet v. Wynne*, 2 B. & Al. 554, 558, Abbott, C. J., said : "Now, even supposing that in strictness these (mineral leases) were receivable in evidence, still that alone will not be sufficient, for it must be further shewn and substantiated, that if they had been received, they would have led to a probable conclusion in favour of the defendant ; but I am clearly of opinion that they would not, and that the rejection was not of any importance as to the result of the verdict. No new trial, therefore, ought to be granted on this ground."

The rejection of evidence which, if admitted, would merely prove a fact sufficiently established by other evidence is no ground for a new trial : see *Edwards v. Evans*, 3 East, 451 ; *Alexander et al. v. Barker*, 2 C. & J. 133 ; *Mortimer v. McCallan*, 6 M. & W. 58, 75 ; *Doe Welsh v. Lungfield*, 16 M. & W. 496.

In *Crease v. Barrett*, 1 C. M. & R. 919, a well considered case, it was held that, where evidence has been improperly rejected, the Court will grant a new trial unless, with the addition of the rejected evidence, a verdict given for the party offering it would be clearly against the weight of evidence.

In *Hughes v. Hughes*, 15 M. & W. 701, 704, Alderson, B., said : "Where evidence has been improperly rejected or admitted, the Court will not grant a new trial, if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict."

It is by sec. 45 of 13 & 14 Vict. cap. 36, enacted as regards Scotland, "That a bill of exceptions shall not be allowed in any cause before the Court of Session upon the ground of the undue admission of evidence if, in the opinion of the Court, the exclusion of such evidence could not have led to a different verdict than that actually pronounced, and it shall not be imperative on the Court to sustain a bill of exceptions, on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived."

It is now provided by rule 3 of Order, 39, made under the English Supreme Court of Judicature Act, 1875, that, "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless, in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action ; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof and direct a new trial as to the other part only."

This closely resembles s. 34 of our Administration of Justice Act, 1874, which enacts that "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence unless, in the opin-



## SPECIFIC PERFORMANCE.

ion of the Court to which application is made, or of any Court of Appeal, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to the part thereof and direct a new trial as to the other part only." Rev. Stat. cap. 50, sec. 289.

Examples, under our Act, of refusal by the Court to order new trials notwithstanding improper reception or rejection of evidence will be found in *Smith v. Murphy*, 35 U. C. R.; 569, *McDermott v. Ireson*, 38 U. C. R., 1; *Davis v. The Canada Farmers' Ins. Co.*, 39 U. C. R. 452. The most recent case touching on the subject is that of *Reg. v. Wilkin-son*, a note of which will be found *post*, *infra*, page 81.

## SPECIFIC PERFORMANCE.

The remedial jurisdiction of the Court of Chancery in the specific enforcement of contracts is of such importance that we are surprised no recent treatise has been written upon the subject. Nearly twenty years have elapsed since the present Mr. Justice Fry modestly gave to the professional world his valuable work on "Specific Performance" which practically superseded all earlier books on that branch of law. Since then the statutory powers of the Court as to awarding damages and compensation and in many other respects have been largely extended, but authorship has not kept pace with the progress of the law in Parliament and in Court.

In no other region of jurisprudence do we find so many instances of that judge-made law which has gone far to nullify

the Statute of Frauds. Equity Judges have been astute from the first so to deal with that famous Act as that it should not be a cover for fraud. The Chief Justice of England is credited with the opinion that the Statute of Frauds has had its day; that it is no longer a useful enactment, that it has now-a-days a great tendency to promote false swearing, and so to defeat the ends of justice. Into this matter, we do not propose to enter, but it may be well to indicate that the force of the Statute has been evaded in equity from the outset, and that successive judges have only developed the ancient doctrines of the Court to suit the exigencies of modern times. The first instance in which any equitable exception to the Statute appears is a case in the time of Lord Nottingham (5 Vin. Abr. 523, 524). There was a verbal contract for the conveyance of land and for a defeasance to be executed by the grantee; but he, having obtained the conveyance, refused to execute the defeasance and relied on the Statute; but his plea was over-ruled and he was decreed to execute according to his agreement. So in *Walker v. Walker*, 2 Atk. 99, Lord Hardwicke said: "Suppose a person who advances money should, after he has received the absolute conveyance, refuse to execute the defeasance, would not the Court relieve against such fraud?" In accord with these early cases, compare *Lincoln v. Wright*, 4 De G. & J. 16, where it is laid down that the Statute formed no defence to the performance sought, because insisting on a conveyance as absolute when it was agreed it should be defeasible was a fraud and should not be allowed to cover fraud. The same matter is put in a different way in *Jervis v. Berridge*, L. R. 8 Ch. 357, where Lord Selborne says: "The conveyance executed was only a piece of machinery obtained as subsi-

## SPECIFIC PERFORMANCE.

diary to and for the purposes of the verbal and only real agreement, under circumstances which would make the use of it for any purpose, inconsistent with that agreement, dishonest and fraudulent." Again in *Davis v. Otty*, 35 Beav. 208, a conveyance of land was made on the parol agreement that the defendant should reconvey if the plaintiff was not convicted of bigamy. The defendant denied the agreement and set up the Statute of Frauds, inasmuch as the alleged trust was not in writing; but the Master of the Rolls held that this was a case of fraud on the part of the defendant and therefore, the Statute did not apply. In *McCormick v. Grogan*, L. R. 4 Eng. & Ir. App. 82, Lord Westbury sets in a different light the principle which influences the Court in such cases in the following words: "The jurisdiction which is invoked is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. The Court of Equity has from a very early period decided that even an Act of Parliament should not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud." It will be observed that this is merely an amplification of Lord Hardwicke's language in *Lloyd v. Spillett*, 2 Atk. 150, where he speaks of one class of resulting trusts which are excluded from the operation of the Statute as those which arise "in cases of fraud and where the transactions have been carried on *mala*

*fide*," and see the same case more fully in *Barnard*, 384.

Likewise as to the effect of part performance in excepting a case from the Statute of Frauds. It has been fully determined, after some fluctuation of opinion, that the mere going into possession is sufficient to let in evidence of the whole contract though none of it be in writing; and this doctrine is applicable as well to corporations as to individuals, and whether it be that the vendor or the purchaser brings suit, and consequently whether it be that the purchaser relies on possession as being *taken* by him, or the vendor relies on possession as being *delivered* by him, in pursuance of the contract. To this effect is the expression of opinion of the Lords Justices in *Wilson v. West Hartlepool Railway Company*, 2 De G. J. & S. 475, where during argument they intimate their view that a purchaser being let into possession was sufficient part performance, whether the contract was sought to be enforced by or against him (p. 485). And at p. 492, Turner, L. J., enforces the same doctrine as to corporations being bound to the same extent as individuals. Reference may also be made to *Pain v. Combs*, 1 De G. & J. 46, on the same point. The moment such taking of possession is shewn, the length of the continuance of that possession is not of much consequence. Indeed one Judge has stated his opinion to be that such possession, "if it be for an hour only" is enough to take the case out of the Statute: *Ungley v. Ungley*, L. R. 4 Ch. Div. 73.

In cases such as these the Statute of Frauds is in truth practically repealed by the Court of Chancery, under the euphemism of excepting the case from its provisions. But such judge-made law has become part and parcel of our legal system, even though it be in the shape of an excrescence. Nothing short of

## LAW SOCIETY.

direct legislation can at this day avail to work any modification in these doctrines of equity.

## LAW SOCIETY.

## MICHAELMAS TERM, 1877.

The following is the resumé of the proceedings of the Benchers for this Term, published by authority :

The several gentlemen whose names are published in the usual lists were called to the Bar, received certificates of Fitness, and were admitted as students of the Laws.

Monday, November. 19.

The report of the examiners on the Intermediate examinations was received, read and approved, and ordered to be adopted.

The report of the committee on Legal Education on the primary examinations was also received and read.

The Report of the same committee on the petition of R. W. Jameson, who had been called to the bar, praying that his second intermediate examination as an articulated clerk may be dispensed with, was laid before convocation and read and ordered to be considered to-morrow.

The petition of Neil Ray, stating that owing to change made in the running of railway trains, he was unable to be present on the 16th inst. for his examination for call and asking that he be admitted to a special examination was read.

Ordered that his request be not granted.

The petition of John Hodgins, asking that he may be allowed to present himself for examination as attorney next Hilary Term instead of Easter was read, and the application refused.

The petitions of various barristers and

students-at-law, asking that the library be opened from 7 p.m. to 10 p.m., was read and ordered to be referred to the Library Committee for Report.

Tuesday, November 20.

Mr. C. S. Wallis, whose examination for call to the bar was passed in Trinity Term last, was ordered to be called to the bar, and on presenting himself was called accordingly.

Moved that the sum of one hundred dollars he paid to Messrs. Evans & Kingsford for their services as examiners at the Primary Examinations this Term.

Moved and resolved, that in the opinion of convocation the amounts charged for copies of short-hand writers' notes are unreasonable and a heavy tax upon suitors, and it is therefore suggested that in all cases where a single copy only of the short-hand notes is required, it shall be furnished at the rate of 5c. per folio, and that in cases where more copies than one are ordered by the same party and at the same time, they shall be charged at the rate of 2½ cents per folio for each copy, and the Benchers respectfully submit this suggestion to the Government for consideration.

Moved and resolved, That it is desirable that the short-hand writers should report the objections taken and points raised by counsel on either side, the rulings of the judges thereon as they occur during the trial, and also the Judge's charge, and that the attention of the proper authority be respectfully requested to the subject of this resolution.

The Financial Statement or Balance Sheet for the third quarter of the present year was laid before convocation.

Saturday, November 24.

The report of the Committee on Legal Education, on the petition of G. H. Smith, was laid before convocation and

## LAW SOCIETY.

adopted. Ordered, that his name be entered on the books of the Society as a student-at-law.

The report of Committee on the Law School was laid before convocation and read.

Ordered, That the said report on the Law School be considered at the meeting of Convocation on the last Friday of Term, and that there be a call of the Bench for that day.

The Committee on Reporting presented returns of the Reporters shewing the number of unreported cases in the Court of Appeal, Queen's Bench, and Chancery, and of Practice cases, up to the first day of Term, as follows: Appeal cases, 18; Practice cases, 23; Queen's Bench cases, 50; Common Pleas cases, 3; Chancery cases, 18; total, 112.

The Chairman reported several resolutions adopted at a meeting of the Bar held on the occasion of the death of the late Honourable William Henry Draper, C.B., Chief Justice of the Court of Appeal.

Ordered, That the said resolutions be entered on the minutes of the proceedings of the Benchers as follows:

"Moved and seconded, That the members of the Law Society desire to record their feeling of profound regret at the death of the Honourable William Henry Draper, C.B., Chief Justice of the Court of Appeal of Ontario, the last surviving member of the former Court of Queen's Bench for Upper Canada. The members of the Bar in thus paying their humble tribute of respect to his memory are but giving feeble expression to the sentiments of the whole profession. His great public services extending over more than forty years, as Solicitor-General, Attorney-General, Puisne Judge of the Court of Queen's Bench, and Chief Justice successively, of the Court of Common Pleas, the Court of Queen's Bench,

and the Court of Appeal, shew how he served his Sovereign in great capacities with ability and integrity, and in a way redounding to his own honour and the benefit of the community, and will cause his loss to be widely mourned, and not least by the members of the profession with whom he was so long and so intimately associated. He was gifted by nature with more than ordinary capacity. As an advocate he won his way to professional distinction by the force of his reasoning, the clearness and terseness of his argument, and the integrity of the true lawyer. In his statement of legal propositions he aimed to be true to the letter and spirit of the law. His learning in Common Law science was unsurpassed and few better understood the doctrines and principles of the system of Anglo-Canadian Jurisprudence established in this country. By a happy union of dignity and courtesy he inspired amongst those who practised before him that spirit of mutual regard and cordial co-operation which has enhanced the dignity of the judicial office and the respect for and confidence in the ability and integrity of the Judiciary which is now, and has been for many years, so distinguishing a characteristic in the public administration of justice in this Province."

Moved and seconded: That the Treasurer of the Law Society be requested to transmit a copy of the resolutions just adopted to Mrs. Draper.—Carried.

Moved and seconded: That the Treasurer do lay the resolutions just adopted before Convocation, and, on behalf of the meeting, request their insertion in the minutes of the proceedings of the Benchers of the Law Society.—Carried.

A letter from the Reporter in Chancery was laid before Convocation.

Ordered, That, under the exceptional circumstances of the case, the request of

## LAW SOCIETY.

the Reporter of the Court of Chaucery be granted.

A letter from the Treasurer of the New York Bar Association was read.

Ordered, That the Secretary acknowledge the letter and transmit a copy of the rules of Convocation and of the Ontario Law List.

Mr. Meredith gives notice of motion to establish branch libraries in the various county towns, to be moved on the last Friday in Term.

Friday, December 7.

The Report of the Examiners of the Examination for Scholarships during the present Term was read, and ordered that the Scholarship for the fourth year be given to Mr. T. Ridout; the scholarship for the third year to Mr. H. P. Sheppard; for the second year to Mr. Nesbitt; and that for the first year to Mr. Drayton.

A letter from Mr. E. J. Senkler, dated 6th December instant, resigning his position of a Benchet, in consequence of having accepted a Judgeship of the County Court, was laid before Convocation, and read.

Ordered: That Mr. Senkler's resignation be accepted, and that his successor as a Benchet be appointed the first Tuesday of Hilary Term next.

The Report of the Committee on Legal Education in regard to certain books to be read by students for scholarships, for examination as articled clerks and final examination as students, was presented, read, and adopted, with amendments, and does not come into force until the first examination after Easter Term, 1878.

Ordered, That, at the same time, "Best on Evidence" be substituted for "Taylor on Evidence" on final examination for Students-at-law.

The consideration of the Report of the

Committee on the Law School was taken up.

Moved: That the Law School be abolished, and cease from and after the last day of Easter Term next.

Moved, in amendment: That the further consideration of the Report of the Committee on the Law School be postponed until the first meeting of Convocation in Hilary Term next, and that it be referred to the said Committee, and the Committee on Legal Education, in the meantime, to confer with the authorities of the University of Toronto, with a few to the affiliation of the Law School with that University, and to consider such amendments in the system of Legal Education as may appear to be desirable, the said Committee to report to Convocation at the same meeting.—Lost.

Moved, in amendment: That for at least a month before the commencement of each of the courses of lectures, the lecturers be required to give notice in the newspapers of the books they intend to lecture upon during the course, and that, as well students who have not attended the lectures of the Law School as those who have may be at liberty to compete at any examination or examinations for a reduction in the term of service.—Lost.

Moved, in amendment: That all further consideration of the subject of the Law School be postponed until the second day of the next Term.—Lost.

The original motion was then carried.

Wednesday, December 26.

The minutes of last meeting were read and ordered to be signed by the Treasurer.

The Second Report of the Committee on Discipline, on the subject of charges made against a member of the Society, was received, and ordered to be considered on the first day of Hilary Term next.

The Report of the same Committee, received on the 7th of December, on the subject of charges against another member of the Society, was considered, and ordered to be adopted.

The Report of the Committee on Reporting was laid before Convocation, read and considered, and ordered to be adopted.

Moved and seconded: That the Report of the Committee on Legal Education, on the petition of Mr. P. H. Drayton, be adopted.

The Report of the Finance Committee on the several petitions of James Elliott, M. A. Dixon, John C. Fraser, James Glass, H. C. McKeown, C. P. Simpson, and Thomas Macnaughton, was received, read, and adopted.

The Report of the Library Committee, recommending the refusal of the petition of various barristers and students asking that the library be opened from 7 P.M. till 10 P.M., was considered and adopted.

Ordered, That the Secretary be instructed to prepare forthwith an Index of the Minutes and Proceedings of Convocation subsequent to Michaelmas Term, 38 Victoria, and that hereafter the minutes be indexed forthwith after the end of each Term, and that the Secretary be authorized to employ such assistance as may be required for that purpose.

## CANADA REPORTS.

### ONTARIO.

#### COMMON LAW CHAMBERS.

[Reported for the *Law Journal*, by N. D. BROW, Student at-Law.]

#### McMASTER V. KING.

*Notice of trial—Demurrer—Re-hearing.*

*Held*, that a notice of trial, given pending a re-hearing

on the decision of a single judge upon demurrer, is irregular, and will be set aside.

[January 9—Mr. DALTON.]

This action was brought to recover the price of goods sold to defendant. The declaration charged the defendant with fraud in obtaining the goods, with the view of having him imprisoned under sec. 136 of the Insolvent Act of 1875. The plaintiff obtained an order for leave to join issue and to demur to one of defendant's pleas; the order did not direct the issues in fact to be tried first. The demurrer was argued before a single judge, who held the plea bad; whereupon the defendant had the demurrer re-heard before the full Court in term, when judgment was reserved. While the case was standing for judgment before the full Court, the plaintiff gave notice of trial, whereupon a summons was taken out on behalf of defendant to set aside the notice.

*Akers* moved the summons absolute. Reg. Gen. Mich. Term, 29 Vict., directs that "the issue or issues of law shall be determined before the trial of the issue or issues of fact, unless otherwise expressly ordered by the Court or Judge in the rule or order permitting such issue or issues to be raised." Under this rule the issues in fact must be *finally* determined. [Mr. DALTON.—If this be the meaning of the rule, the defendant might prevent the plaintiff from having the issues in fact tried for an almost indefinite length of time by appealing again and again.] The case of re-hearing from a single judge is different from an ordinary appeal, and the Statute seems to look upon it in a different light, from the fact that if the defendant appeals he must give security, which he need not do upon a re-hearing. The case of *Goldie v. Date Patent Steel Company*, 7 Prac. R. 1, is a direct decision in defendant's favour. If the plaintiff be allowed to go to trial, and if he prove fraud as charged in the declaration, the Judge is bound, under the Insolvent Act, to order the defendant to be imprisoned, notwithstanding that he may not be liable even for the debt.

*W. McDonald* shewed cause. The demurrer has been determined within the meaning of the rule mentioned; if not, the result will be, that the defendant may keep the plaintiff from having the issues in fact tried for an indefinite time. The case of *Goldie v. Date*, is not applicable to the present case. There is a case of *Caldwell v. Macfarlane*, which appears in the *Legal News*, vol. 1, page 4 (Quebec), which shows that it is discretionary

C. of A.]

NOTES OF CASES.

[Q. B.]

with the Judge to order the defendant to be imprisoned on proof of fraud, and no judge would do so in such a case as the present.

Mr. DALTON thought the issues in law had not been *determined* within the meaning of the Rule mentioned in the argument, and therefore set aside the notice of trial, but, as the point was new, without costs.

*Order accordingly.*

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### QUEEN'S BENCH.

IN BANCO—HILARY TERM.

FEBRUARY 7.

ROBINSON V. FEE.

*Trespass—Trover—Right to Crops—Licensee.*

W. R., father of plaintiff, having made default in a mortgage on some land, the land was sold under decree of the Court of Chancery to the plaintiff. He failed to carry out the purchase, and the land was sold and conveyed to C. S., plaintiff contending that C. S. was his trustee in the purchase. Plaintiff subsequently executed a release to C. S., who sold to defendant, who, as plaintiff contended, had notice of plaintiff's claim. Some bargaining took place between plaintiff and defendant as to the purchase of the land from the latter, but it was not carried out. The plaintiff lived on the land with his father, and while this bargaining was going on harvested his crops and placed them in the barn, and shortly after a conversation with the defendant regarding the purchase he was turned out of possession and his crops seized by the sheriff under a writ of assistance issued in the Chancery suit to which he was no party. In an action of trespass *q. c. f.* and trover: *held*, under the facts more fully set out in the case, that plaintiff had a mere license to live on the land and had acquired no interest in the land or crops, and that the action would not be sustained.

*Quære*, had he a claim for work, services

and outlay on the land while the license lasted.

*J. W. Kerr*, for plaintiff.

*Armour, Q. C.*, for defendant.

CHURCHER V. BATES.

*Tax sale—Wrong lot sold—Improvements.*

Where land was assessed by the wrong number of the lot, and the sheriff, at a tax sale pointed out the identical piece of land on which the taxes were properly payable and which was in fact the land assessed though called by the wrong number, and sold that land by the wrong number: *Held* that the purchaser was entitled, on ejectment by the owner, to protection under 33 Vict., cap. 23, sec. 9, and to be repaid his purchase money and interest and subsequent taxes and improvements.

*Meredith, Q. C.*, for plaintiff.

*Glass, Q. C.*, for defendant.

MCMASTER V. KING.

*Demurrer—Insolvent Act 1875, sec. 63.*

Declaration on several promissory notes alleging that the debt was one for the enforcing of which defendant might be imprisoned, and setting out, that the notes were given for goods bought when defendant knew himself to be insolvent and that the goods were obtained by false pretences, &c.

Plea that defendant had been discharged by a duly executed and confirmed deed of composition and discharge, and that defendants had had notice of all proceedings—had proved their claim as an ordinary one—had accepted composition notes, one of which had been paid.

Replication that the plaintiffs did not assent to the discharge.

Rejoinder setting out the proceedings in insolvency and plaintiff's conduct.

*Held*, on rehearing, by Harrison, C. J., and Armour, J., reversing the decision of Wilson, J., sitting in vacation, that the plaintiffs by their conduct as to the composition deed and accepting notes and payment under it, and by their silence respecting the nature of their debt were precluded now from saying that their debt was other than an ordinary debt which would have been discharged under the Act.

*W. Macdonald*, for plaintiff.

*George Kerr, Jr.*, for defendant.

Q. B.]

NOTES OF CASES.

[Q. B.

REGINA V. WILKINSON.

*Criminal information—New trial—Rejection of evidence.*

This case is fully reported in 40 U. C. R. 1, where a criminal information was granted as to two alleged libels in a newspaper published by the defendant on the 12th and 19th of November, 1876, and referred to in one of the 5th November. At the trial it was attempted to put in evidence the libel of the 5th November and a letter called in the report "The big push letter." The judge at the trial refused both applications. He did not consider that they were pressed upon him. *Held per Harrison, C. J.*, that the rejection was right, but by Wilson, J., that they were admissible as part of the plaintiff's case, and that this was ground for a new trial if the applications had been pressed which it was said they had not been.

The learned judge told the jury that there was no evidence to support pleas of justification. Harrison, C. J., agreed and *held* that there was no misdirection. *Per Wilson, J.*, that there was evidence of justification to go to the jury, and that there should be a new trial on this ground. The Court being equally divided, on the statement of the defendant's counsel that he desired to appeal, Wilson, J., withdrew his judgment *pro forma*, and the rule was discharged.

(Armour, J., was concerned in the case at the Bar and took no part in the judgment.)

*Bethune, Q. C.*, and *Delamere* for the Crown.

*Robinson, Q. C.*, and *McCarthy, Q. C.*, and *O'Brien* for the defendants.

ESSEX V. ROCHESTER—MERSEA V. ROCHESTER—GOSFIELD V. ROCHESTER.

*Municipal Act—Drainage By-law—Arbitration under.*

The Township of Rochester<sup>4</sup> proposing to make a drain which would benefit other municipalities than itself, made an assessment upon such municipalities under sec. 447, *et seq.* of the Municipal Act. Of such municipalities, the County of Essex and the Townships of Mersea and Gosfield, being dissatisfied, gave notice of appeal and under the provisions of sec. 489, *et seq.*, of the Municipal Act. Separate arbitrations were held and awards made. Rules were granted to set aside the awards. *Held*, that a County is a municipality within the meaning of the Act, and liable to

be assessed for such drains; but *held*, also, that where more than two municipalities are interested in the works, the arbitration between them should be one joint arbitration, under sec. 281, and not separate arbitrations between the assessing municipality and each of the appealing municipalities, and on this ground the awards were set aside; but, as the point was a new one, without costs. Remarks as to the proper mode of proceeding under the Act.

*Ferguson, Q. C.*, and *Crickmore*, for County of Essex.

*Bethune, Q. C.*, and *H. J. Scott*, for Township of Rochester, in first case.

*Robinson, Q. C.* for Township of Mersea.

*Bethune, Q. C.*, and *W. Douglas*, for Township of Rochester, in second case.

*Bethune, Q. C.*, and *S. White*, for Township of Gosfield.

*W. Douglas* and *H. J. Scott*, for Township of Rochester, in third case.

REGINA V. AMOR.

*Criminal Law—Unorganized Districts—Commission to District Judge—Powers of Dominion and Province of Ontario, as to*

Where, on behalf of two prisoners convicted of manslaughter and murder, it was objected that Walter McCrae, Judge of the Provisional Judicial District, before whom they had been tried, had no jurisdiction to try them under the commissions purporting to authorize him to do so, because, 1, neither the authorities of the Dominion nor of the Province of Ontario could authorize him to act as Judge of Oyer and Terminer and General Gaol Delivery, under C.S.U.C. ch. 11, as he was not one of the classes of persons named in sec. 2 of that Act, not being a County Court Judge, notwithstanding the powers conferred by C.S.U.C. ch. 128, sec. 194; and, 2, because the authorities of the Dominion could not constitute a court except by Act of Parliament, and there was none; and the authorities of Ontario could not appoint a judge; and that, therefore, the two commissions issued respectively by the Dominion and Ontario, under which the prisoners were tried, were void. The Court, on a case reserved, overruled all the objections, and gave judgment for the Crown.

*Hardy, Q. C.*, for the Crown.

*M. C. Cameron, Q. C.*, for the prisoners.



Q. B.]

NOTES OF CASES.

[C. P.]

## VACATION COURT.

Wilson, J.]

[January 29.]

GRAHAM V. MCKERNAN.

*Demurrer—Insolvent Act of 1875—Composition and discharge—Confirmation.*

*Demurrer* : Declaration ; common counts.

*Plea* : That plaintiff, before action, assigned to an official assignee under the Act of 1875, and said alleged debts and causes of action are vested in the assignee.

*Replication 2* : That before action the official assignee, in conformity with a deed of composition and discharge duly executed, &c., by deed, duly transferred to the plaintiff all the estate vested in the assignee, by reason whereof the causes of action were duly vested in plaintiff.

*Replication 3* : That the causes of action were for sums of money payable by defendant to plaintiff for goods bargained and sold, &c., subsequent to the making of the assignment, and the assignee had not interfered in this action or required the defendant to pay him the moneys due in respect of said cause of action.

*Rejoinder 3 to 2nd replication* : That the discharge by the deed of composition was not before action confirmed by the Court or a Judge.

*Held*, second replication bad because it did not show the discharge was made effectual by confirmation.

*Quere*, was it not also bad because it did not shew that the creditors who executed the composition and discharge had proved.

*Held*, 3rd replication good.

*Held*, 3rd rejoinder also good.

*H. H. Strathy* for plaintiff.

*McCarthy*, Q.C., contra.

Gwynne, J.]

[January 20.]

ROXBOTTOM V. THE COUNTIES OF NORTHUMBERLAND AND DURHAM.

*"Temperance Act 1864"—Assessment Rolls.*

*Held*, that in voting on a by-law under the "Temperance Act of 1864," the assessment rolls should be used, and not the voters' lists. Where, therefore, the assessment rolls had been used and a by-law passed, a rule to quash the by-law was discharged with costs.

*H. Cameron*, Q.C., for the applicant.

*Bethune*, Q.C., and *Osler* for the counties.

Gwynne, J.]

[February 5.]

REGINA V. MRS. PHILIP WILLIAMS.

*Sale of Liquor—Occupant—Married Woman.*

The defendant, a married woman, was convicted of selling liquor without a license, in premises of which it was admitted her husband was the occupant. It appeared that the husband was in gaol for a similar offence. *Held*, that the defendant was properly convicted, though, if her husband had been at home, she could not—her act then being that of her husband, who then might be convicted for her act.

*Blackstock* for defendant.

*Fenton* for the Crown.

Gwynne, J.]

[February 8.]

REGINA V. GLOUCESTER AND OTTAWA ROAD CO.

*Joint Stock Road Co.—Allowing road to be out of repair—Indictment.*

A Road Company, incorporated under the Joint Stock Road Companies' Acts, allowed their road to get and be out of repair. *Held*, that an indictment would lie, notwithstanding the special remedy given by the Incorporating Act, 16 Vict., cap. 190, secs. 34, 35, and amending Acts, viz., as suspending the right to take tolls.

*Beatty*, Q. C., for the demurrer.

*M. C. Cameron*, Q. C. contra.

## COMMON PLEAS.

IN BANCO—HILARY TERM.

FEBRUARY 4.

CHURCH V. FENTON.

*Sale of land for taxes—Indian lands surrendered to the Crown—Liability to taxation—List of lands to be attached to warrant—22 Vict., cap. 36, sec. 128.*

In 1854, certain Indian lands were surrendered by the Indians to the Crown. In September, 1857, the land in question, being a portion of such lands, was sold by the Crown to a purchaser, the first instalment of the purchase money was paid on the 15th February, 1858, and the last instalment on the 29th July,

1867, when the lot was paid for in full; and on the 14th June, 1869, the patent issued. In 1870, the land was sold for its taxes, assessed and unpaid for the years since 1864.

*Held*, that such lands were liable to taxation, and therefore properly assessed and saleable for arrears of taxes, and that sec. 9, clause 24, of the British North America Act in no way prohibited such assessment and sale.

By the 128th section of the Assessment Act, 32 Vict., ch. 36, the treasurer is required to transmit a list in duplicate of the lands to be sold for taxes to the warden, who is required to authenticate each of such lists by affixing thereto the corporate seal, and his signature; and one of such lists was to be deposited with the clerk of the County Court, and the other was to be returned to the treasurer with a warrant thereto annexed, under the hand of the Warden and seal of the County, commanding him to levy, &c.

*Held*, that the section was merely directory, and was sufficiently complied with by the list of lands being embodied in the warrant, instead of being annexed thereto.

*M. C. Cameron, Q. C.*, for plaintiff.

*Reeve*, for defendant.

#### LAWRENCE V. KETCHUM.

*Will—Description of properties—Parol evidence.*

In 1845, Jesse Ketchum, who then resided in Toronto, went to reside at Buffalo, visiting Toronto once or twice every year. In 1862, he purchased lots 1 and 2, in the Township of Mono, in the County of Simcoe. In 1863, Orangeville was incorporated as a village and annexed to the County of Wellington, lot No. 1 being detached from Mono, and comprised within the boundaries of and made to belong to the Village of Orangeville. On March 27th, 1866, Jesse Ketchum made his will, wherein, amongst other devises, he made a devise of "all my real estate in the Township of Mono, in the County of Simcoe," &c. Ejectment was brought against defendant, claiming Lot No. 1 under the devise, and for defendant it was contended that the words as and when used by testator and understood by him covered all the lands formerly in Mono, and that the fact of Lot No. 1 being taken therefrom, and put into another municipality and County was not present to his mind, but that he described the lands by the local name they once bore, and as he always understood them to bear.

*Held*, that Lot No. 2, which exactly fulfilled

the description of the devise alone passes under the devise, and that parol evidence was inadmissible to shew that the testator intended to include Lot No. 1.

*Richards, Q. C.*, and *Bethune, Q. C.*, for the plaintiff.

*M. C. Cameron, Q. C.*, and *Robinson, Q. C.*, for defendant.

#### MEAKIN V. SAMSON ET AL.

*Husband and wife—Goods supplied to wife—Separate trading—Liability for husband's debts.*

The plaintiff's husband had been engaged in business, and had become insolvent and failed to obtain his discharge. Certain persons who had been her husband's creditors, during his inability to carry on business on his own behalf, furnished the wife, who was not possessed of separate estate, with goods to enable her to carry on a separate business, taking her notes in payment. The business name used was that of the wife, but the business was carried on by the husband, acting under a power of attorney from the wife, which enabled him to buy and sell, and to enter into all contracts, and give all kinds of notes, &c., in the wife's name, at a salary of \$10 00 per week, which was used for the support of the husband, wife and children, who were all living together, and away from the place of business, which the wife seldom visited and never for business purposes. The goods having been seized under an execution, issued by one of the husband's creditors, the wife claimed them, and an interpleader was directed to be tried.

*Held*, Galt, J., dissenting, that the wife was not entitled to the goods; that there was no separate trading of the wife, but that the whole thing was a device to enable the husband to carry on business in his wife's name, and so defeat his creditors.

*M. C. Cameron, Q. C.*, for the plaintiff.

*D. H. Thompson*, for the defendant.

#### VACATION COURT.

Gwynne, J.]

[February 11.]

BOYCE ET AL. V. O'LOANE.

*Action on judgment—Statute of Limitations—38 Vic. cap. 16, sec. 11, O.*

To an action on a judgment, the defendant

Chan.]

NOTES OF CASES.

[Chan.]

pleaded that the alleged cause of action did not accrue within ten years before this suit.

*Held*, by Gwynne, J., a good defence, under the Act 38 Vict., ch. 16, sec. 11, O.

*J. E. Rose*, for the plaintiff.

*Oster*, for the defendant.

### CHANCERY.

Spragge, C.]

[January 16.

WORSWICK V. THE CANADA FIRE AND MARINE INSURANCE CO.

*Fire insurance—Condition—Warranty.*

The plaintiff who resided at a distance and held a mechanic's lien on a mill, applied to the agent of the defendants to effect an insurance thereon to the amount of \$3,000. One of the questions put to the applicant was if a watchman was kept on the premises during the night? His answer thereto was, "The building is never left alone, there being always a watchman left in the building when not running." In the policy issued thereon special reference was made to the application of the assured as "which is his warranty and part hereof." When the application was made there was a watchman kept on the premises and continued to be so kept until a month after the issue of the policy when, without the knowledge of the plaintiff, such watch was discontinued; and in about five weeks thereafter the premises were destroyed by fire. *Held*, that the answer of the plaintiff did not amount to a warranty but only a representation which he could not be held bound to make good; the terms of the policy being that the parties had agreed that alterations to avoid the policy must be within the control or with the knowledge of the assured; of which control or knowledge in this case there was not any evidence.

Proudfoot, V. C.]

[January 16.

LAILAW V. JACKES.

*Will, construction of—Dower—Election by widow.*

*Held*, that a bequest by a testator to his widow of the annual income from the real and personal estate during her widowhood and until the eldest son attained his majority for the support of herself and the maintenance, education and support of all

the children during their minority; and after the eldest attained 21, and as each reached that age the income to be paid to them proportionally after making ample provision for the support of the widow during her widowhood, did not indicate an intention on the part of the testator to give her this in lieu of dower.

Although a widow is bound to bring her action for dower within 20 years from the death of her husband, the statute limiting that time does not apply where the widow is brought unwillingly before the Court and she only seeks to reduce the amount of rents charged against her by setting off what she is entitled to as dowress.

The testator gave his sons the option of purchasing the shares of his daughters in the real estate after marriage or death of the widow for the sum of £500 each.

*Held* that the fact of the sons having, during the life time of the widow, joined in leases naming all the children, sons as well as daughters, as lessors—some of the sons being then infants—was not such an act as deprived the sons of afterwards exercising the right or option of purchasing the interests of the daughters.

REES V. FRASER.

*Will, construction of—Heirs at law and next of kin.*

A testator by the residuary clause in his will gave and bequeathed "all the remainder of my real and personal estate whatsoever of which I may die possessed or be in any way entitled to, to my dear wife Ann, and on her decease the same to go [to] my heirs and next of kin."

*Held*, that the son of a deceased daughter, who had predeceased the testator was entitled to a share in such residue (personal as well as real), and that, notwithstanding the fact that under the will such grandson was entitled to a legacy of \$4,000.

DUNNETT V. FORNERI.

*Jurisdiction of Court—Communion—Costs.*

An attendant at an Episcopal Church filed a bill against the incumbent thereof praying amongst other things that the defendant might be restrained from refusing to allow the plaintiff to partake of the Lord's Supper and from suspending or excommunicating the plaintiff as a member of that congregation or church:

[Chan.]

NOTES OF CASES.

[Chan.]

*Held* that, although the facts were as alleged by the bill—though denied by the answer—the Court has not any jurisdiction to enforce the claim of the plaintiff; but the Court being of opinion that all the grounds of defence, other than that of want of jurisdiction, had signally failed, in dismissing the bill, refused the defendant his costs.

ALLEN V. THE EDINBURGH LIFE  
ASSURANCE CO.

*Dower, sale of, under fl. fa.*

Since the passing of the Statute 40 Vict., cap. 8, (O.) the right of a woman to dower, as well during the life of her husband as after his death, is such an interest in lands as can be sold under a *fl. fa. et law*.

Spragge, C.]

[January 18.]

BEYSON V. HUNTINGDON.

*Mortgage—Lands in Ontario and Quebec—Practice.*

Where in a suit on a mortgage covering lands in the Province of Ontario, and also in Quebec, the defendant (the mortgagor) waived his right to claim a sale of the property and elected to have a decree of foreclosure pronounced, the Court on further directions ordered, in the event of default being made in payment, that the defendant should execute to the plaintiff such a conveyance as would vest in him all the estate or interest of the defendant in the lands in Quebec.

Proudfoot, V. C.]

[January 18.]

COY V. COY.

*Trust deed—Trustee and cestui que trust—Discretion of Trustee.*

John Coy the Elder, by deed of 30th of January, 1862, conveyed the lands in question in the cause to his daughter, S. C.: "In trust from and after the death of the grantor until the youngest child of John Coy shall arrive at the age of 21 years, the proceeds arising from the use of the land shall be applied for the use and benefit of the said John Coy and his family, so far and in such a way as to the said Sarah Coy, her heirs or executors, shall seem right and proper; and after the said youngest child shall so arrive at the age of 21 years, it shall be the duty of the said Sarah Coy, her heirs or executors, to either divide the land between the said John Coy and his children or sell and

dispose of the same, and the proceeds of such sale to apply for the benefit of them the said John Coy and his children, in such way or manner as to her or them shall seem right and proper."

*Held*, that, under the deed, S. C. was a trustee to apply the proceeds of the land till the youngest child of John Coy, living at the death of the grantor, attained twenty-one, for the use and benefit of John Coy and his family, to the extent and in the manner S. C. might deem right and proper, the amount and mode of application being left entirely in her discretion; and after such child attained twenty-one either to divide the land amongst John Coy and his family, or to sell the same and apply the proceeds for the benefit of John Coy and his children, in such manner as to her should seem right and proper; but she was not at liberty to select one child and give the whole proceeds to such one; the discretion vested in the trustee being as to the amount, and mode of application—not as to the persons to be benefited; and this discretion within these limits the Court would not control.

Proudfoot, V.C.]

[January 23.]

MCCORMACK V. BULLIVANT.

*Mechanic's Lien—Demurrer.*

*Held*, that a sub-contractor, though entitled to a lien upon property for the construction of which he has furnished material to an original contractor or another sub-contractor, must, under the provisions of the Act of 1874, in order to enforce such lien, institute proceedings for that purpose within thirty days after the material furnished and the work completed by him; the lien in such case arising from the doing of the work, not from registration as under the Act of 1873.

RE ROBERTSON;—ROBERTSON V. ROBERTSON.

*Dower, value of.*

*Held*, on appeal from the report of the Master, that a woman is entitled to dower in lands on which she and her deceased husband had joined in creating a mortgage to secure a debt of the husband; and that in valuing such dower the value of the whole estate is the basis of computation—not the amount of surplus after discharging the claim of the mortgagee.

Chan.]

NOTES OF CASES.

[Chan.]

Spragge, C.]

[January 24.]

ROBSON V. ARGUE.

*Mortgages—Lis pendens.*

*L.* created a second mortgage after a bill had been filed to foreclose a prior incumbrance on the same land.

*Held*, that the mortgagee in such second mortgage took subject to the *lis pendens*, even though service of the bill had then not been effected; and a bill filed by him to redeem the prior incumbrancer, after a final foreclosure in such suit, was dismissed with costs.

CRAIG V. MILNE.

*Sureties for Assignee in Insolvency—Injunction—Practice.*

This Court will not interfere by injunction to restrain proceedings instituted against the sureties of a defaulting assignee in insolvency; notwithstanding several actions may have been brought against them, and the aggregate amount sought to be recovered greatly exceeds the amounts for which they had become security. The proper mode of proceeding in such circumstances is as pointed out in *Sinclair v. Baby*, 2 Prac. R. 117.

Spragge, C.]

[February 1.]

MILLER V. MILLER.

*Will, construction of—Interest on legacies—Lunacy of testator.*

A testator by his will dated 30th June, 1863, gave one half of his farm to his widow during her widowhood for the maintenance of herself and children, "and with regard to the stock on the said lot at the time of the decease of my said wife, with any other personal effects or property in her possession, she is hereby empowered to make such distribution as to her shall seem best." In July of the following year the testator became insane, a committee of his person and estate was appointed who, under an order in lunacy, leased the lands and sold the farm stock and implements:

*Held*, that the order in lunacy and sale thereunder operated as an ademption of the legacy to the wife, so far as the farming stock and implements were concerned: but that under the power of distribution given by the will she was empowered to make such distribution of the personal effects bequeathed to her as to her should seem best: not only as to the amounts to be distributed but also as to the objects of the distribution.

The testator devised a lot of land to his son John, his heirs and assigns for ever.

*Held*, notwithstanding the subsequent lunacy of the testator, the devisee was not entitled to the rents of the estate prior to the decease of the testator.

The testator devised to another son another portion of his farm with a direction that the rents thereof should be set apart from the date of the will until the son attained 21 to enable him to erect suitable buildings thereon. The Court, in order to carry out the manifest intention of the testator, clearly expressed in his will, directed an allowance to be made to the son, out of the surplus handed over by the committee to the executors, of a sum equal to the amount of such rents from the date of the will until the son attained twenty-one; and directed a reference, if necessary, to ascertain the amount.

The testator gave legacies of \$1,000 each to two of his daughters, payable in seven years from the date of the will:

*Held*, that they were not entitled to interest from the expiration of such seven years, but only interest as in an ordinary case.

He also gave a legacy to another daughter in these words, "I give and bequeath to my daughter E. M. the sum of \$1,200, such sum to be invested by my executors seven years from the date hereof until the said E. M. attains the age of twenty-one years, which said sum of \$1,200 and the interest accrued thereon shall be paid over for her benefit when she attains the age of twenty-one years as aforesaid."

*Held* that she was entitled to interest from the death of the testator only.

Spragge, C.]

[February 5.]

LEEMING V. SMITH.

*Pleading—Demurrer—Surety—Parties.*

The bill alleged the purchase by the plaintiff of certain land which at the time was subject to a mortgage not then due, and which the vendor agreed to pay off; and having conveyed the land to the plaintiff by a deed containing covenants for quiet enjoyment and freedom from incumbrances, he, with a surety, executed a bond to the plaintiff "conditioned to indemnify and save her harmless from the said mortgage;" that the mortgage had since become due and payable, and the plaintiff prayed that the defendants (the vendor and his surety) might be ordered to pay it off. The bill, however, did not contain any allegation that the plaintiff had been disturbed in her pos-

[Chan.]

NOTES OF CASES.

[Chan.]

ession or hindered in the enjoyment of the premises, neither did it allege any demand of payment by the mortgagees.

A demurrer by the surety for want of equity was allowed with costs.

#### SMITH V. SMITH.

##### *Administration—Injunction.*

J. W. S. was killed by a railway disaster in the State of Ohio, and the defendant, his widow, while residing in the State of New York, took out administration to his estate there, and instituted proceedings in the Courts of the State of New York against the railway company, which was incorporated in both those States, to recover damages. This action was compromised by the company paying to the widow in New York \$4,000. Part of that money she brought to this country, a portion of which, it was alleged, she invested in business, another portion being deposited in a bank. Under these circumstances, J. W. S. having died childless, the father of the deceased claimed to be entitled to one-half of the sum received from the railway company, and filed a bill seeking to restrain the withdrawal of the money from the bank, and the further carrying on of the business, which, however, the widow denied was hers. The evidence of experts—lawyers practising in the States of Ohio and New York respectively—as to what was the proper distribution of the fund was contradictory, as was also the evidence as to the ownership of the business.

Under these circumstances, the Court refused to restrain the carrying on of the business, but directed the defendants to keep an account of the dealings thereof, and continued an interim injunction obtained *ex parte*, restraining the withdrawal of the money from the bank.

#### JOHNSON V. HOGG.

##### *Administration suit—Liability of executors for negligence—Costs.*

*Querre*, whether the Act of Ontario (cap. 37 of 1869) alters the law, as to the liability of executors for assets of an estate lost by their negligence: but the fact of merely allowing a debt to remain outstanding is not *per se* negligence: Therefore where in an administration suit it was shewn that stock in a gravel road company amounting to \$260 and promissory notes to the amount of \$748 had been left outstanding and unrealized by the executor, and there was no suggestion that there was any danger to the fund caused thereby, and the matter in respect of which the executor was called in question was small, except the claim of the plaintiff as a creditor, in respect of which he had failed, the Court, on further directions, re-

fused relief to the plaintiff, and dismissed his bill with costs, but without prejudice to his right to institute another suit in the event of any future maladministration of the estate.

#### TOWNSHIP OF HAMILTON V. STEVENSON.

##### *Foreclosure—Immediate Sale—Incumbrancers.*

This was a suit to foreclose a mortgage. The defendant by his answer admitted facts which entitled the plaintiff to a decree, but asked a sale instead of foreclosure, as prayed by the bill.

On the cause coming on by way of motion for decree,

*Boyd*, Q. C., for the plaintiffs, asked that a decree for immediate sale of the mortgage premises might be made.

*Moss*, for the defendant consented. It was stated by counsel that the solicitor for the plaintiffs had instructed him that there were subsequent incumbrances, and that Vice-Chancellor Blake had, under similar circumstances, held that there could not be a decree for immediate sale in the absence of a consent from the subsequent encumbrancers, but that as no such case had been reported, the probability was that the decision was only that in a suit to foreclose an immediate decree, for that relief, would not be granted in the absence of such consent. In case of a sale the subsequent encumbrancers have no right to redeem—only to be paid out of any surplus—and therefore are in no wise injured by an immediate sale being granted.

Spragge, C. thought the decree might go as asked.

Spragge, C.]

[February 13.]

#### LING V. SMITH.

##### *Will, construction of—Bequest to a class—Inaccurate description of legatees.*

A testator, after making sundry dispositions of his estate, devised a portion of it to executors to sell, and the proceeds, after payment of debts, "to divide equally between my said son C. W. S. and my daughters by my first marriage." The testator had been thrice married. Of the first marriage there was no issue, male or female, living at the date of the will—several years after the death of his first wife; by the second marriage he had issue, one son, C. W. S. and four daughters, all surviving; by his third wife, who survived him, he had issue, one son, J. S. and four daughters.

*Held*, that the daughters by the second marriage sufficiently answered the description in the will, who, with their brother (C. W. S.), were entitled *per capita*; not that C. W. S. was entitled to one moiety, and the daughters, as a class, to the other moiety; that so far as the suit was

Chan.]

NOTES OF CASES.

[Chan.]

rendered necessary,—by the ambiguity arising out of the inaccurate description of the class the testator intended to benefit,—the costs of all parties should be borne out by the estate; but that C. W. S. must bear the costs incurred by him in asserting his claim adversely to his sisters.

Spragge, C.]

[February 15.]

Re CHARTERIS.

*Lunacy.*

Funds were bequeathed to trustees; and one of the *cestuis que trust*, it was stated, had been declared lunatic in Scotland, and a *curator de bonis* of the estate of the lunatic was appointed. The lunatic was not absolutely entitled to the fund, and the trustees applied to the Court for liberty or instructions to remit the fund to the Curator.

The Court under the circumstances refused to make such direction and directed a reference “to the Master to enquire and report (1) whether M. A. C. in the petition mentioned has been found and adjudged a lunatic according to the law of Scotland; (2) whether A. S., in the petition named, has been appointed *curator de bonis* of the estate of the said M. A. C., and if so, whether he has given security for the proper application of any moneys of the said M. A. C., and the nature and amount of such security.”

Proudfoot, V. C.]

[February 19.]

DOUGLAS V. CHAMBERLAIN.

*Mechanic's lien against a mortgagee—Pleading.*

The Revised Statutes of Ontario (cap. 120, sec. 7) gives a contractor a lien for work done and materials furnished upon land subject to a mortgage, in priority to the mortgagee, on the amount by which the selling value of the property has been increased by the work and materials of the party furnishing the same, but a bill filed for the purpose of enforcing such a claim must state distinctly the dates of the encumbrances having been created.

Proudfoot, V. C. in disposing of a bill filed for this purpose, observed: “I think that in the absence of any distinct allegation that the mortgages were on the land before the commencing of the work or placing of the materials, the plaintiffs are not entitled to the priority they claim against the mortgagees in virtue of this statute. The dates are not stated positively. . . . Upon the record as at present framed the plaintiffs are not entitled to the priority sought, and the mortgagees would seem to be unnecessary parties. The plaintiffs may, if they choose, take a decree affecting the equity of redemption only, or they may amend their bill as they may be advised.”

BROUGHTON V. SMALLPIECE.

*Mechanics' Lien Act—Increase of value of land.*

Where buildings or other improvements are placed upon land subject to a mortgage, by reason of which the value of the land is increased, the contractor is only entitled to a lien on the property to the extent of such increase in the value of the land, irrespective of the buildings or other improvements, or of the amount expended in their construction. Therefore, where property was sold under a decree of this Court for \$1,000, and the Master certified the value without the improvements to be \$600, a contractor who held a lien under the Act was restricted to his proportionate share (with other lien holders) of the \$400 increase in value, and that although it was shewn that the contract price for the buildings had been \$1,950.

Blake, V. C.]

[February 19.]

Re CAMPBELL.

*Bar of Dower—Husband and wife—Notice of motion.*

This Court will not, acting under the Revised Statutes of Ontario, cap. 120, sec. 10, order a conveyance free from the dower of a wife living apart from her husband, unless it is shewn that the party moving is unable to serve notice of the intended application upon the wife, or that she has left her husband and has expressed her determination never to return to reside with him.

This was an application by Mr. A. G. McMillan (Whitby), upon the petition of R. E. Campbell, setting forth that the wife of the petitioner was, and had been for two years, living apart from him under such circumstances as, in the words of the statute, disentitled her to dower of certain lands which he had contracted to sell and was desirous of selling, and praying for an order to “dispense with the concurrence of the wife for the purpose of barring her dower therein.” It appeared that no notice had been served upon the wife; that she was resident in the same locality as the husband, and that no difficulty existed in effecting service of a notice upon her. Counsel submitted that it was discretionary with the judge before whom the application is made to grant the order *ex parte*; and that the facts appearing here were such as to warrant such an order being made in this matter.

Blake, V. C. — The course pursued by the Courts of England, acting under a similar provision, is in all cases to require notice of the application to be given, unless indeed it be shewn that unreasonable difficulties are thrown in the way of effecting service on the wife, or that she has left her husband's roof, and expresses a determination never to return to reside with him. I am clearly of opinion that you must give notice.

## DIGEST OF ENGLISH LAW REPORTS.

## ENGLISH REPORTS.

## DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH AND APRIL, 1877.

(Continued from p. 66.)

## FRAUDULENT PREFERENCE.

The Stock-Exchange rules provided that a member unable to meet his engagements on the Exchange should be declared a defaulter, cease to be a member, and not be eligible for re-admission without paying one-third of his Stock-Exchange debts. The committee of the Exchange were to collect the defaulter's assets, and pay them out *pro rata* to his Stock-Exchange creditors. Outside creditors were not to be recognised. C., a member, had been declared a defaulter, and had given a check for £5,000 to the committee for his Stock-Exchange creditors. He afterwards went into bankruptcy. *Held*, that the £5,000 must be given up to the trustees in bankruptcy for the general creditors.—*Ex parte Saffery. In re Cooke*, 4 Ch. D. 555.

FUND IN COURT.—See COLLISION, 3.

GIFT TO CLASS.—See CLASS.

HUSBAND AND WIFE.—See BANKRUPTCY; CUSTODY OF CHILD; DIVORCE; MARRIAGE SETTLEMENT, 2; TRUSTEE.

IMPLIED WARRANTY.—See WARRANTY.

INDICTMENT.—See CONSPIRACY.

## INFANT.

Plaintiff loaned the defendant, a minor, and his mother £150, part of which was expended for necessaries for the minor. As security for the repayment of said sum, the mother undertook to convey her life interest, and the minor his reversionary interest, in some property to plaintiff. On the minor attaining twenty-one, plaintiff brought an action against him for an account of moneys spent for necessaries; and asked that the amount so found might be declared a lien on the defendant's reversion. The account, with an order for repayment, was allowed, but the deed was declared not binding on the defendant.—*Martin v. Gale*, 4 Ch. D. 428.

INFRINGEMENT.—See COPYRIGHT.

## INNKEEPER.

Defendant R. kept a hotel, and under the same roof a refreshment bar and counter, where passers could obtain drink. Prosecutor was a neighbour, and had a way of coming to the bar with his dogs, to the annoyance of the guests, who complained. The proprietor requested him to keep his

dogs away. Subsequently he came into the bar with a big dog, and asked for refreshments, which were refused him. He had the innkeeper indicted for refusing to furnish refreshments. *Held*, that the indictment could not be maintained, as the bar was not an inn, and the prosecutor was not a traveller; and, moreover, that his conduct in annoying the guests with his dogs was sufficient ground for the defendant to refuse to entertain him.—*The Queen v. Rymer*, 2 Q. B. D. 136.

## INSURANCE.

The question was, whether, in a valued policy on freight, the freight meant was the whole freight, or the balance after deducting certain advances that had been made. *Held*, that the rule, that in a valued policy the question of the valuation cannot be gone into, did not preclude an inquiry into the above question. Rule that a marine policy may be ratified after notice of loss, affirmed.—*Williams et al. v. The North China Insurance Co.*, 1 C. P. D. 757.

INTENTION.—See CLASS; EMBEZZLEMENT, 1.

JOINT TENANT.—See APPOINTMENT.

LACHES.—See MORTGAGOR AND MORTGAGEE, 1.

## LANDLORD AND TENANT.

W. made an agreement in writing, not under seal, with B., by which W. undertook to demise to B. a certain messuage as tenant from year to year, so long as B. paid the rent, and W. had power to let the premises. The rent was below the market rate. B. paid his rent quarterly. *Held*, in a suit by W. against B. for possession, that the instrument was not a lease, on the ground of uncertainty, and as not conforming to the Statute of Frauds, and the 8 & 9 Vict. c. 106. The defendant had only a tenancy from year to year.—*Wood v. Beard*, 2 Ex. D. 30.

LATENT DEFECT.—See WARRANTY.

## LEASE.

In the *habendum* of a lease executed in 1874, the term mentioned was 94½ years, in the *reddendum* 91½. In the counterpart of the lease executed by the lessee both the *habendum* and the *reddendum* had 91½. *Held*, overruling the common pleas that there was a plain clerical error,—that the "94" must be rejected, and the lease be construed as for 91½ years.—*Burchell v. Clark*, 2 C. P. D. 88; s. c. 1 C. P. D. 602.

See LANDLORD AND TENANT; SPECIFIC PERFORMANCE.

## LIBEL AND SLANDER.

1. The medical officer of a workhouse in a small country district is not a person of sufficient consequence to the whole country to constitute the publication by a *Man-*



## DIGEST OF ENGLISH LAW REPORTS.

*chester* daily paper of certain proceedings of the guardians of said workhouse, reflecting upon said medical officer, privileged. Neither is the workhouse of sufficient importance to the country at large to render such an article privileged.—*Purcell v. Sowder et al.*, 1 C. P. D. 781.

3. The defendant was an expert in handwriting, and gave evidence in a will case, to the effect that the signature was a forgery. In another case, where defendant was on the stand, allusion was made by counsel to some remarks of the judge disparaging to the witness in the will case, and the defendant, though forbidden by the judge to allude further to the will case, insisted on saying, "I believe that will to be a rank forgery," &c. *Held*, that the privilege of a witness extended to cover this case, as the remark was made by witness in defence of his own credit as an expert.—*Seaman v. Netherclift*, 2 C. P. D. 53; s. c. 1 C. P. D. 540.

**LIEN.**

A solicitor in a suit in bankruptcy employed by the trustee is entitled to retain papers on which he has expended labour or his own money, as security for his fees.—*Ex parte Yalden. In re Austin*, 4 Ch. D. 129.

**See VENDOR AND PURCHASER.**

**LIMITATION OF LIABILITY.**—See COMMON CARRIER.

**LIMITATIONS, STATUTE OF.**—See STATUTE OF LIMITATIONS.

**MARINE INSURANCE.**—See INSURANCE.

**MARKET VALUE.**—See DAMAGES.

**MARRIAGE.**—See WILL, 2.

**MARRIAGE SETTLEMENT.**

1. J., on occasion of his second marriage, made a settlement of a piece of land upon trust for himself and his second wife, during their joint lives, and the life of the survivor, remainder to his son by a former marriage, T., absolutely. The wife's property was at the same time settled to her separate use, with power of appointment, and in default of appointment to her children born or to be born. J. sold the land to the plaintiff. *Held*, that, in the marriage settlement, the provision for the son was a purely voluntary one, and not valid against a purchaser of the property for consideration.—*Price v. Jenkins*, 4 Ch. D. 483.

2. S. and wife had a power of appointment over real estate in favour of their children. They had six children; and, on the eve of marriage of one daughter, an agreement was made between S. and his wife, and the daughter and the intended husband, by which the parents agreed to ap-

point a portion of the property to the daughter in consideration of the marriage; and the intended husband agreed that he would "settle such share as" his wife should receive, to her use, with power of appointment, remainder to himself, and ultimate remainder to the children of the marriage. S. survived his wife, released his power of appointment, and gave a portion of the interest in the property after his death to said daughter. The daughter died, leaving two infant children, and before her husband had taken any steps to carry out the "settlement" proposed in the agreement made at the time of the marriage. The question was whether the marriage agreement was binding on the wife, and consequently on the oldest child, her heir at law. *Held*, that although the husband, by that agreement, engaged to settle what was not his, but his wife's, yet the wife would be bound by it, on the ground that she had assented to her father's arrangement, and hence it was also binding on her heir, and must be carried out.—*Lee v. Lee*, 4 Ch. D. 175.

**MASTER AND SERVANT.**—See EMBEZZLEMENT, 2.

**MEASURE OF DAMAGES.**—See DAMAGES, 1, 2.

**MISDESCRIPTION.**—See DEED.

**MISTAKE.**—See SALE.

**MORTGAGOR AND MORTGAGEE.**

1. S. H., tenant for life in leasehold property under a will, began proceedings for administration in 1859. In 1859 and 1860 she mortgaged her life interest. The same year the mortgagee entered under an order, received the rents for the interest, and paid the balance to the tenant for life. March 25, 1866, S. H. left her home, and was never heard of again. In 1875, the remaindermen under the will petitioned to have the leasehold sold, and the proceeds paid to them. For the purposes of that petition it was decided that S. H. must be considered to have died soon after June, 1866. On a petition by the remaindermen for arrears of rent from the mortgagee, *held*, that they were entitled to only six years' rent to the date of the petition, as there was no relation of trust between the mortgagee and them, and that there was no laches on their part in not filing the petition before the expiration of seven years from the disappearance of S. H.—*Hickman v. Upsall*, 4 Ch. D. 144.

2. E., a trader, made a mortgage conveyance to one P. of all his stock of upholstery goods in his shop in D. street, and in the same deed of all his household furniture in his house in S. street. There was a power in the deed for the mortgagee at any time to take and retain possession of

## DIGEST OF ENGLISH LAW REPORTS—LAW STUDENTS' DEPARTMENT.

property. At 9.25 A. M. on June 28, P took possession of the shop and contents. At 10 A. M. of the same day E. filed his petition for liquidation, but without notice to P.—On the afternoon of the same day, and after he had notice of the petition, P. took possession of the furniture in S. street. *Held*, that P. was entitled to the furniture as well as the stock in trade, as against the liquidator.—*In re*

*Ex parte Phillips*. *Ex parte* *Under*, 4 Ch. D. 496.

W. deposited with C. certain bonds to secure a loan. C. filed a bill for foreclosure. *Held*, that the doctrine of equitable mortgage of real estate by deposit of deeds cannot be extended to authorize mortgage of personal property to foreclose. C. can only have an order of sale.—*Carter v. Wake*, 4 Ch. D. 605.

*THE DOWER; FIXTURES.*

*MAIN.*  
Commissioners under the Act to supply water to A. with pure water were authorized to purchase land, construct gas works, and to levy rates upon occupiers and recover by distress; and the land as well as the soil were vested in A. They were also authorized to borrow money, and they made mortgages of the lands, rents, and rates as security for moneys borrowed. P. left £400 in these estates by will to a charity. *Held* that the term of the mortgage conferred on the charity an interest in land, and hence that the securities came within the statute of mortmain.—*Chandler v. Howell*, 4 Ch. D.

*USARIES.*—See *INFANT.*

*WERSHIP.*

A banker, took in K. as a member of a firm, the latter furnishing no capital, and having nothing to do with the conduct of the business. H. engaged secretly in speculations, drew money from the bank fraudulently, and manipulated the books to conceal his performances, lost in his ventures, and finally committed suicide. K. left his supposed profits in the bank, and on his death he had to go into bankruptcy. The administration proceedings on H.'s estate made the trustees in bankruptcy of K. present a claim for H.'s fraudulent overdrawings. *Held*, that the claim should be allowed.—*Lacey v. Hill*, 4 Ch. D. 537.

*NT.*

Case of insufficiency of specification in the matter of a lamp-burner. Description and accompanying figures did not agree.—*See v. Safety Lightning Company*, 4 Ch. D. 7.

(To be continued.)

## LAW STUDENTS' DEPARTMENT.

## EXAMINATIONS, HILARY TERM.

As students are always anxious to know what marks they have obtained at an examination, and as those who do well should have due credit, we have obtained and now publish the result of the several examinations which have lately been held.

## STUDENTS-AT-LAW.

## Graduates.

Alex. Dawson, B.A., University of Toronto.  
T. D. Cumberland, B.A., Queen's College.  
W. B. Carroll, B.A., Trinity College.

## Undergraduates.

Francis Badgley, University of Toronto.  
William Molson, "  
Gilbert Lilly, "  
J. A. C. Reynolds, Victoria College.

## Primary Examination.

## Maximum, 1,600.

H. A. McLean, 1,388; William Burgess, 1,357; L. F. Heyd, 1,281; J. F. Canniff, 1,274; J. D. Gansby, 1,221; G. Corry, 1,203; E. W. Nugent, 1,183; C. P. Wilson, 1,138; D. McArdle, 1,074; Thos. Hislop, 1,050; W. A. McLean, 1,049; A. J. Williams, 1,032; J. J. Pantton, 998; W. M. Shoebottom, 936; J. G. Wallace, 923; G. Morehead, 919; W. G. Shaw, 873; R. Patterson, 862; H. H. Robertson, 856; J. A. Shettle, 834; G. F. Rutman, 833; M. McFadden, 830; A. Ford, 806; G. H. C. Brooke, 804.

Thirty-eight presented themselves for this examination.

## ARTICLED CLERKS.

## Maximum, 800.

H. White, 577.

Four presented themselves for this examination.

## INTERMEDIATE EXAMINATION.

## Maximum, 360.

## Minimum, 150.

Minimum, to pass without oral, 225.

## FIRST.

E. V. Bodwell, 286; F. E. Hodgins, 279;  
J. M. Glenn, 276; E. Cahill, 268; R. Cas-

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

sidy, 256; W. Nesbitt, 256; M. A. McHugh, 254; C. R. Radcliffe, 253; S. J. Weir, 249; J. A. Allen, 244; A. Cryaler, 241; G. A. Somerville, 231; J. B. McKillop, 227; W. White, 225—(without oral).

Harley, 224; D. E. Shepperd, 207; J. R. Lavell, 204; James Riddell, 190; W. Proudfoot, 169; H. J. Duncan, 166; F. Rogers, 160.

## SECOND.

W. J. Gorman, 283; J. J. Scott, 268; Geo. Claxton, 257; J. Cowan, 239; J. B. McLaren, 234; W. R. Hickey, 225—(without oral).

W. M. Reade, 215; E. G. Carey, 207; P. A. McDonald, 205; J. R. McColl, 205; T. W. Crothers, 204; W. J. Lavery, 197; Thos. Ede, 193; J. B. Rankin, 186; C. M. Foley, 183; W. Fletcher, 181; A. W. Brown, 176; C. S. Rankin, 174; G. F. Jelfs, 171; A. H. Leith, 169; C. W. Mortimer, 156.

## CERTIFICATES OF FITNESS.

*Maximum*, 600.

*Minimum* 300.

*Minimum without oral*, 450.

R. Dingwall, 531; D. M. Christie, 478; C. G. Snider (Barrister), 421 (without oral); J. Stone, 446; J. Nicholls, 424; R. Strachan, 397; J. A. Worrell, 397; V. A. W. G. Robertson, 388; H. A. L. White, 366; J. G. Carrell, 364; D. R. Springer, 357; F. W. Gearing, 353; W. J. Hales, 338; G. A. Skinner, 303.

## CALL.

*Maximum*, 600.

*Minimum* 300.

*Minimum without oral*, 450.

G. F. Shepley, 504; W. J. Clarke, 500; E. G. Ponton, 399; W. E. Hodgins, 398; J. Ketchum, 387; Robt. Shaw, 371; H. P. O'Connor, 350; W. C. Moscrip, 333; J. J. Robertson, 329.

The first two passed without oral by their marks, the rest because they were attorneys.

## EXAMINATION QUESTIONS.

We have received a letter from a law student urgently requesting us to obtain and publish some of the questions for the Intermediate Examinations. We accede to his request and hope he and his brethren will profit by them. The

following are the questions at the Examination for last Term :

## FIRST INTERMEDIATE.

*Equity.*

1. Distinguish between money payable by way of penalty and as "liquidated damages."
2. Why cannot all trusts regarding lands be proved by parol?
3. What is an equitable mortgage?
4. Define "accident."
5. Explain the doctrine of specific performance.
6. What must the assignee of a chose in action do in order to prevent the assignment to him being defeated by a subsequent assignment of the same debt to another?
7. Explain the maxim "Equity follows the law."

## SECOND INTERMEDIATE.

*Leith's Blackstone—Greenwood on Conveyancing.*

1. How may guardians of infants be appointed?
2. Who is entitled to possession of land after execution of a mortgage of it?
3. Distinguish between custom and prescription.
4. What are requisites of an exchange?
5. In what ways can a parol lease be surrendered?
6. A mortgagor wishing to pay off his mortgage finds that more than the usual expense will be incurred in obtaining a reconveyance by reason of the death of the mortgagee, or his having made a settlement of the mortgage money. By whom must the extra expense be borne?
7. By whom are the costs connected with the preparation and execution of a lease to be borne, in absence of any special agreement?

## CERTIFICATE OF FITNESS.

*Equity.*

1. A, believing himself the owner of a parcel of land, erects buildings thereon with the knowledge of the owner, who fails to

LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS—SPRING ASSIZES.

rm A of his mistake. What, if any, edy has A?

What is meant by argumentativeness leading, and what by multifariousness?

What different courses are open to a ui que trust whose property has been ngfully converted by his trustee?

In what summary way, without the in- ition of a suit, may a trustee obtain an r of the Court of Chancery fixing the unt of the trustee's commission in re- t of his dealings with the trust moneys?

Distinguish between actual and con- ctive notice.

Under what circumstances may an un- tered instrument, prior in point of , prevail as against a registered instru- t?

Two persons buy an estate and cause conveyance to be made to them as ten- in common. One pays the whole pur- e money. Has he any lien on the other 's share? Explain.

What is the rule as to the validity or wise of a mortgage given by a client to icitor (a) to secure costs already incur- (b) to secure future costs.

How may a vendor's lien for unpaid ase money be defeated?

Enumerate the different circum- es under which a bill of complaint may smitted for want of prosecution.

*Leake on Contracts—Statutes.*

To what Court does an appeal lie from judgment of a judge of the County t? Sketch briefly the practice in bring- e case on by way of such appeal.

Goods are sold upon a contract to pay them by the purchaser's promissory payable at a future day, default is e in giving the note: what is the ven- entitled to recover in an action for the ch of the contract?

Distinguish between a warranty and a esentation.

What is the general rule as to the t of the death of the grantor of a power attorney upon the power of attorney? t statutory exception is there to the ?

What is a patent ambiguity, and what atent ambiguity? What is the rule in ase as to the admissibility of evidence plain such ambiguity?

What is the effect on a written con- of its alteration by one of the parties out the consent of the other?

7. Define nominal damage. What is meant by special damage?

8. What contracts of hiring require to be in writing? Why?

9. State some circumstances under which a person may be held liable on a contract entered into in his name by a third person for him without his authority.

10. Where both the proposal for the sale of goods and the acceptance is by letter sent through the post, when is the contract complete?

We have received, but too late for insertion, a note of the proceedings of the Osgoode Literary and Debating Society, on 16th and 23rd February last. It will appear next month.

SPRING ASSIZES.

EASTERN CIRCUIT.

Hon. Mr. Justice GALT.

1. Cornwall....Tuesday.....19th March.
2. Perth .....Wednesday...27th March.
3. Ottawa ....Tuesday..... 2nd April.
4. Pembroke ... " .....30th April.
5. L'Orignal .. " ..... 7th May.

MIDLAND CIRCUIT.

Hon. Mr. Justice MORRISON.

1. Belleville...Tuesday..... 2nd April.
2. Napanee ..... " .....16th April.
3. Kingston .... " ..... 23rd April.
4. Brockville ... " ..... 7th May.
5. Picton ..... " .....14th May.

VICTORIA CIRCUIT.

Hon. Chief Justice of ONTARIO.

1. Whitby....Tuesday.....19th March.
2. Cobourg .... " .....26th "
3. Brampton .. " ..... 9th April.
4. Lindsay .... " .....16th "
5. Peterborough " .....23rd "

BROCK CIRCUIT.

Hon. Mr. Justice BURTON.

1. Woodstock...Tuesday..... 2nd April.
2. Owen Sound..Monday..... 8th "
3. Walkerton...Tuesday.....16th "
4. Stratford.... " .....23rd "
5. Goderich ....Monday..... 6th May.

## SPRING ASSIZES—FLOTSAM AND JETSAM.

## NIAGARA CIRCUIT.

Hon. Mr. Justice Gwynne.

1. Cayuga.....Tuesday.....19th March.
2. Welland...Tuesday.....26th "
3. St. Catharines, Monday....8th April.
4. Hamilton...Tuesday.....23rd April.
6. Milton .... " ..... 7th May.

## WATERLOO CIRCUIT.

Hon. Mr. Justice Patterson.

1. Barrie.....Monday.....1st April.
2. Simcoe....." .....15th "
3. Berlin....." .....22nd "
4. Brantford .. " .....29th "
5. Guelph .... " ..... 6th May.

## WESTERN CIRCUIT.

Hon. Mr. Justice Wilson.

1. London ....Tuesday.....19th March.
2. St. Thomas. " ..... 2nd April.
3. Sandwich... " ..... 9th "
4. Sarnia..... " ..... 16th "
5. Chatham ...Monday.....22nd "

## HOME CIRCUIT.

Hon. Mr. Justice Armour.

- Toronto (Assize } Tuesday....19th March.  
and Nisi Prius.) }  
Toronto (Oyer } Tuesday....16th April.  
and Terminer.) }

At every *nisi prius* there shall be a jury and a non-jury list, the latter not to be taken up till the jury is dismissed. The Chief Justice of the Common Pleas will remain in Toronto to hold the Vacation Court, etc.

In the Court of Queen's Bench the sitting of Trinity Term last was extended for one week pursuant to the powers given by Rev. Stat. cap. 39, sec. 11.

## CHANCERY SPRING SITTINGS.

Hon. V. C. Proudfoot, Toronto.

Toronto.....Monday.....March 11

## WESTERN CIRCUIT.

Hon. The Chancellor.

- Woodstock.....Thursday .....April 25  
Chatham.....Wednesday ....May 1  
Sandwich.....Tuesday....." 7

- Sarnia .....Saturday .....May 11  
Stratford .....Wednesday .....15  
Goderich .....Tuesday....." 21  
Walkerton.....Tuesday....." 28  
Barrie.....Friday ....." 31

## EASTERN CIRCUIT.

Hon. V. C. Blake.

- Lindsay.....Monday.....April 1  
Peterborough...Thursday .....4  
Cobourg .....Monday....." 8  
Belleville .....Monday....." 15  
Ottawa .....Tuesday.....May 21  
Brockville.....Monday....." 27  
Cornwall.....Thursday ....." 30  
Kingston .....Monday.....June 3

## HOME CIRCUIT.

Hon. V. C. Proudfoot.

- St. Catharines...Tuesday .....April 2  
Hamilton.....Friday ....." 5  
Brantford .....Tuesday....." 16  
Simcoe .....Tuesday....." 23  
Guelph.....Friday ....." 26  
Owen Sound.....Friday .....May 3  
Whitby .....Tuesday....." 7  
London .....Monday....." 13

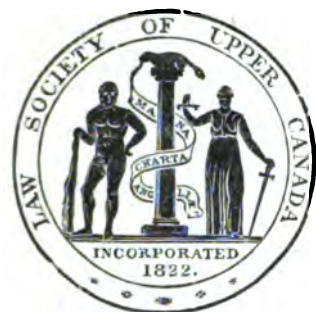
## FLOTSAM AND JETSAM.

A somewhat startling and rather curious judgment was recently delivered by a sessions judge in one of the Bengal districts. Four persons were brought before him on a charge of murder, and were duly convicted but in passing sentence the judge apparently found himself in a difficulty. "There is no doubt," said he, "that all four are guilty of murder, and are therefore liable to be hanged; but I do not think it is necessary for four lives to be taken for one, but that one case of capital punishment will be enough for example!" Although, in addition to this, he said further on that "all four seem to have been equally active," yet he concluded by sentencing the apparently oldest and strongest of the prisoners to death, and the other three to imprisonment for life. It is needless to say that on an appeal to the High Court the sentence was not confirmed. Yet such is the reading of the law by some of the Indian judges.

—*Albany Law Journal.*



LAW SOCIETY, HILARY TERM.



Society of Upper Canada.

OSGOODE HALL,  
HAELEMAS TERM, 41ST VICTORIA.

ing this Term, the following gentlemen  
called to the Bar, viz:—

TALBOT MACBETH.  
JOHN LANTON WHITING.  
KENNETH DINGWALL.  
RALPH WINNINGTON KEEFER.  
ALEXANDER DUNCAN CAMERON.  
WALTER BARWICK.  
JOHN FRANKLIN MONCK.  
WILLIAM BEAIRSTO.  
JOHN WINCHESTER.  
THOMAS DALZIEL COWPER.  
GEORGE JOSEPH O'DOHERTY.  
SILAS CORBET LOCKE.  
FRANK MADILL.

following gentlemen were called to the Bar  
39 Vict. chap. 31. :—

JAMES SMITH FEAD.  
WILLIAM ROBERT WHITE.

following gentlemen received Certificates  
ness :—

TALBOT MACBETH.  
RALPH WINNINGTON KEEFER.  
FREDERICK PIMLOTT BETTS.  
ROBERT WILLIAM EVANS.  
THOMAS TREVOR BAINES.  
CHESTER GLASS.  
EDWARD GEORGE PONTON.  
WILLIAM EGBERTON HODGINS.  
ALLAN BRISTOL AYLESWORTH.  
EDWARD STONEY SMITH.  
WILLIAM BEAIRSTO.  
JOHN INKERMANN McCracken.  
CHRISTOPHER CONWAY ROBINSON.  
FRANK MADILL.

e following gentlemen were admitted into  
ociety as Students-at-Law :—

*Graduates.*

AS C. L. ARMSTRONG, M.A., Toronto Uni-  
versity.  
OR M. STROMBERG, B.A., Dalhousie Col-  
lege.  
LES JOHN LOGAN, B.A., Trinity College.  
REEVE LAVELL, B.A., Queen's College.  
STRANGE, B.A., Queen's College.  
DOHERTY, B.A., University of Toronto.  
GE HENRY SMITH, B.A., University of To-  
ronto.  
ANDER INNES, B.A., University of Toronto.  
A. HOUSTON, B.A., Trinity College.

*Matriculants.*

ALFRED E. H. CRESWICK, University of Toronto.  
A. DE BLAQUIERE FARMER, University of Toronto.  
FREDERICK W. DAVIS, Albert College.

*Junior Class.*

ELVIN W. ROSS.  
HARRY DALLAS HELMCKEN.  
JOHN WILLIAM BINKLEY.  
FREDERICK EYRE SULLIVAN.  
FRANCIS A. CAMPBELL.  
ALEXANDER MCKENZIE.  
H. DANIEL COUGHLIN.  
JAMES ALBERT KEYES.  
RICHARD M. C. TOOTHE.  
JOSEPH PRIESTLEY FISHER.  
JAMES PITT MABEE.  
DENNIS J. DONOHUE.  
ALFRED HENRY CLARK.  
W. R. CAVELL.  
WILLIAM WARDROPE.  
WALTER CAMPBELL.  
WILLIAM AGUTTER TAYLOR.  
RODERICK MCLEAN.  
THOMAS P. COFFEE.  
LEWIS HENRY DICKSON.

*Articled Clerk.*

FRANK E. HART.

PRIMARY EXAMINATIONS FOR STU-  
DENTS-AT-LAW & ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any  
University in Her Majesty's Dominions, em-  
powered to grant such Degrees, shall be entitled  
to Admission upon giving six weeks' notice in  
accordance with the existing rules, and paying  
the prescribed Fees, and presenting to Convoca-  
tion his Diploma or a proper Certificate of his  
having received his Degree.

All other Candidates for Admission as Students-  
at-Law shall give six weeks' notice, pay the pre-  
scribed Fees, and pass a satisfactory Examination  
in the following subjects :—

CLASSICS.

Xenophon, Anabasis, B. I.; Homer, Iliad, B.  
I.; Cicero, for the Manilian Law; Ovid, Fasti,  
B. I., vv. 1-300; Virgil, Aeneid, B. II., vv. 1-  
317; Translations from English into Latin; Paper  
on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic  
Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition;  
an Examination upon "The Lady of the Lake,"  
with special reference to Cantos V. and VI.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George  
III., inclusive. Roman History, from the com-  
mencement of the second Punic war to the death  
of Augustus. Greek History, from the Persian  
to the Peloponnesian Wars, both inclusive.  
Ancient Geography: Greece, Italy, and Asia  
Minor. Modern Geography: North America  
and Europe.

## LAW SOCIETY. HILARY TERM.

## Optional Subjects instead of Greek :

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. Musaeus, Stumme Liebe. Schiller, Lied von der Glocke.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects :—

Ovid, Fasti, B. I., vv. 1-300; or,

Virgil, Aeneid, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A Student of any University in this Province who shall present a Certificate of having passed, within four years of his Application, an Examination in the subjects above prescribed, shall be entitled to Admission as a Student-at-Law or Articled Clerk (as the case may be), upon giving the prescribed Notice and paying the prescribed Fee.

All Examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be :—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding :—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requirements for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I. Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. — Williams on Real Property, Byles on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year. — Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year. — Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading and Practice in this Province.

No one who has been admitted on the Books of the Society as a Student, shall be required to pass Preliminary Examination as an Articled Clerk.

The Primary Examinations take place on the Tuesday and Wednesday next but one before each Term.

The Final Examinations and the Intermediate Examinations take place during the week immediately before each Term.

The Scholarship Examinations take place during the second week of Michaelmas Term.

## TERMS.

Hilary Term begins on the first Monday in February.

Easter Term begins on the third Monday in May.

Trinity Term begins on the first Monday after the 21st of August.

Michaelmas Term begins on the third Monday in November.

## FEES.

Notice Fee..... One Dollar.

Primary Examination Fee (Students)..... Fifty Dollars.

Primary Examination (Articled Clerks)..... Forty Dollars.

Intermediate Examination Fee..... One Dollar.

Attorneys, Final Examination Fee..... Sixty Dollars.

Barriester's..... One Hundred Dollars.

In Special Cases, under 39 Victoria, chapter 31, a Fee of Two Hundred Dollars is payable in addition to the above.

N.B.—After Easter Term, 1878, Bees on Evidence will be substituted for Taylor on Evidence, Smith on Contracts, for Leake on Contracts.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR APRIL.

County Court Term begins.  
 Canada discovered, 1490.  
 County Court Term ends.  
 First newspaper published in America, 1704.  
 Good Friday.  
 St. George's day.  
 Earl Cathcart, Governor-General, 1846.  
 Queen proclaimed Empress of India, 1876.  
 Last day for completion of rolls by Assessors.

## CONTENTS.

## PART I.

TRIALS :	PAGE
Court of Appeal .....	97, 98
Back on a Judge .....	97
Witnesses giving evidence on their own behalf ..	97
Sentencing Judgments .....	98
Proceedings of Law Society, Hilary Term .....	100
CTIONS :	
Title of Holders of Negotiable Instruments ..	102
Precedent Opinions .....	106
TES OF CASES :	
Court of Appeal .....	108
Election Court .....	111
Queen's Bench .....	112
Common Pleas .....	113

## Canada Law Journal.

Toronto, April, 1878.

noticeable fact is the great number of cases which are now brought to the Court of Appeal. This may be accounted for, but cannot wholly, be accounted for by the "great expectations" formed by the minds of disappointed and exasperated litigants and sanguine young lawyers, by a too profuse sprinkling at an early period of "appeal allowed." If the Court continues to grow, as we think it is so growing, in public confidence, a plethora of work will continue; but not altogether a satisfactory state of things when appeals so much abound.

Before this number reaches our readers the Court of Appeal will have passed a set of general orders, annulling all rules and orders heretofore made, except the rules now in force respecting appeals to the Privy Council. There is to be a separate set of rules for County Court appeals. This will be a great boon to the legal profession. The Judges have also prepared a tariff of fees under sec. 123 of

the Insolvent Act, which has long been wanted. They should now, "while their hand is in," set themselves to the task of putting the Surrogate tariff, both for clerks and solicitors, in a more reasonable shape. At the present day it is an absurdity. The Lieutenant-Governor must, however, first appoint the Commission.

Let there be enrolled among the curiosities of law, the charge which a chairman of Quarter Sessions, according to the *Solicitors' Journal*, recently gave to the jury, "Let me tell you gentlemen, that a man who walks arm-in-arm down the street with a man who has stolen ducks, is equally guilty in the eye of the law."

A gross attack has recently been made by a disreputable country paper upon the County Judge of the County of Ontario. The article is so abusive that the writer has overshot his mark, and has only succeeded in bringing upon himself contempt. He is, according to his own shewing, a disappointed suitor, who seems to have endeavoured to make a municipality pay more for printing than his regular rates. The learned Judge can well afford to leave the matter to the good sense of the community, though we should be glad to see the writer receive the punishment he so richly deserves.

The House of Commons has adopted the principle that persons charged with common assault shall be competent witnesses in their own behalf, and may also be called as witnesses for the prosecution; and further, that the wife shall be a competent witness on behalf of the accused. The bill was introduced by a private member, a layman, but the Minister of Justice said he saw no objection to it, and it was fully discussed by



## EDITORIAL ITEMS—DISSENTING JUDGMENTS.

the lawyers on both sides of the House. Another bill of a similar nature has also been introduced by a private member, to make a defendant and his wife competent and compellable to give evidence on indictments for non-repair of highways, &c., or for a nuisance, or other proceedings for the purpose of trying a civil right only. We agree with some of those who took part in the discussion, that such important alterations as these in the Criminal Law, (and especially important in that they may be a step to a more radical change,) should emanate from the Government, or, at least, that the head of the proper Department should take them up as Government measures.

The Court of Appeal has been trying to circumscribe the limits of citation among American "authorities," so-called. One learned judge thought it would be of no value to cite Utah decisions on questions as to the property and rights of married women. Another considered that unless some case in point could be found nearer than California, he would not feel himself bound by a decision so far to the west. But speaking seriously, the complaints from the bench as to the multitudinous citation of cases which may be found almost wholesale in United States text books and digests is well-founded. It is hard enough to master the legitimate authorities, but no judge could find time to go through the mass of American case law to elucidate the matter in hand. The line should be drawn so as to include the decisions of the Supreme Court, and in other well-known reports, such as Paige, Sanford, Pickering and Wendell, and of such well-known Judges as Kent, Story, Shaw and Parsons, but outside of this, the Court should make no note of what is cited. Our law

has not yet come to the pass adverted to in the *Central Law Journal*, "that the reported decisions of any judge, no matter where or when, no matter how much or how little of a jurist he may have been is more potent with nine out of ten Courts than any amount of reasoning and logic."

## DISSENTING JUDGMENTS.

Our former article thus entitled has provoked a good deal of hostile criticism in the columns of our Quebec contemporary, *The Legal News*. The practice of the Privy Council in delivering one judgment which represents the joint opinion of the Court, though pronounced an admirable practice by the last editor of Austin's Jurisprudence, finds no favour with the Montreal critic. The sole reason given is the very insufficient one "that the suppression of dissentient opinions has proved highly inconvenient in several cases . . . in passing over important issues on which both parties desired an opinion." It may gratify the individuals interested in the particular case to have all its niceties explored, and each judge giving his views thereon; but regarding the matter from the broader point of view of the profession, such judgments do not declare the law except in so far as the judges concur in the matter decided. All else is in the nature of *obiter dicta* and the accumulation of such opinions in the reports is by all thoughtful jurists deprecated. Life is too short for the professional man to master the growing accumulations of the law, even when most carefully expurgated in the reports. Why should he further be compelled to waste time in finding out what is decided by going through the reasonings of each particular judge and aggregating the results? With all deference to opposite views, we

## DISSENTING JUDGMENTS.

unit that this is the work which the  
res themselves should do ; and, uni-  
g their conclusions so far as may be,  
result should be given by one voice  
ne judgment of the Court.

We are speaking, of course, of supreme  
ellate tribunals, and no better illus-  
on can be given of the two systems  
a comparison of the reports in the  
se of Lords and those in the Privy  
ncil. If the most cumbrous plan for  
odying judge-decided law were to be  
en, surely the method of the Law  
ds could not be improved upon. If  
most scientifically precise plan were  
e sought, where could one better look  
a model than in the best judgments  
ne Privy Council (say those of Lord  
gdown) ? When considering the im-  
of a decision in the Lords, one must  
ys bear in mind the observation of  
d Westbury, that what is said by a  
d in moving the judgment of the  
se of Lords does not by any neces-  
enter into the judgment of the  
se : *Hill v. Evans*, Jur. N.S., p. 528.  
same matter is more elaborately put  
Chief Justice Whiteside in a case  
ch gave the Irish bench a deal of  
ble : " We are admonished," he says,  
at it is the very decision of the  
se of Lords we are to obey, and not  
observations of any noble Lord in  
ing his opinion. Noble Lords in  
ng their judgment often differ from  
other in their reasons ; they cannot  
be right in opinions which conflict.  
not, therefore, the peculiarities of in-  
dual opinion which are to be obeyed,  
the judgment of the House itself :"  
*Mansfield v. Doolin* ; Ir. R. 4 C.L. 29.

Our contemporary proceeds to affirm  
the suppression of dissentient opin-  
is deceptive in itself, is unfair to dis-  
ing judges, and is calculated to retard  
progress of jurisprudence. In contra-  
tion of these positions, any thing that

we could say would be of little weight as  
compared with the views which eminent  
judges have left on record. Of these, two  
may be cited, one from an English, the  
other from an American source. " I very  
much wish," is the language of Lord  
Mansfield to Sir Michael Foster, " that  
you would not enter your protest with  
posterity against the unanimous opinion  
of the other judges. . . . The authorities  
which you cite prove strongly your  
position ; but the construction of the  
majority is agreeable to justice ; and  
therefore, suppose it wrong upon artifi-  
cial reasonings of law, I think it better to  
leave the matter where it is. It is not  
*dignus vindice nodus*."

In a letter of Mr. Justice Story to  
Mr. Wheaton, the reporter, he writes as  
follows : " at the earnest suggestion (I  
will not call it by a stronger name), of  
Mr. Justice Washington, I have deter-  
mined not to deliver a dissenting opinion  
in *Oliver v. The United States Ins. Co.*  
3 Wheat. 183. The truth is, I was  
never more entirely satisfied that any  
decision was wrong than that this is, but  
Judge Washington thinks (and *very cor-  
rectly*) that the habit of delivering dis-  
senting opinions on ordinary reasons  
weakens the authority of the Court, and  
is of no public benefit."

Of what use or value is a dissenting  
opinion in the Supreme Court ? The  
decision of the majority fixes the law  
irrevocably, and their conclusions can be  
modified or reversed by nothing short of  
legislative authority. It is urged that  
the minority should proclaim their views  
—that they should take means to let the  
world know that they are not to be  
held responsible for the error of the ma-  
jority. We submit that such self-asser-  
tion is made at the expense of the Court  
of which the minority forms a part. So  
our contemporary goes on urging that  
even where the decision turns on a ques-

## DISSENTING JUDGMENTS—LAW SOCIETY; HILARY TERM.

tion of evidence, an injustice may result from the suppression of dissent. For example, he says, the decision of the majority may attach a serious imputation of fraud to an individual. But surely this is regarding the reports from a personal instead of a professional view-point—the fallacy which pervades the whole of the article in question. For the purpose of exculpating or mitigating the guilt of the individual, the dissent may be of consequence; but it is as mere surplusage when the question is what does such a case decide? The *Central Law Journal*, one of the best informed of our American legal exchanges, heartily endorses the views we have expressed on this subject.

The *Legal News* is vexed at our slighting allusion to the Lower Canadian decisions—their uncertainty and want of unanimity. But his own correspondent "S," points the contrast between the dignified self-repression of a Story and the effusiveness of those Courts where "each judge thinks his own opinion quite as good as that of any other judge, or bench of judges, or number of judges expressed at different times and rather better."

The writer of the letter in the *Legal News* continues in this strain:—"I have very little hesitation in saying that the decisions of our Courts have a larger degree of uncertainty about them than those of the Courts of any country with which we are at all familiar. And why? Because the judges in our Courts have not sufficient unanimity—or unity, perhaps, would express it better—in their bearing towards the jurisprudence of the Province as a whole; but treat each case separately and individually, and sometimes with very little regard for the opinions of each other.

We agree with our contemporary in one of his remarks, and that is that there

should be no cast-iron rule, but that the matter should be left to the discretion and wisdom of the judges themselves, to decide when they should yield their individual opinion, and refrain from entering a dissent. As we know, some judges have no discretion, even when an Act of Parliament confers it upon them. The initial numbers of the Supreme Court Reports of the Dominion appear to us of evil omen from the length and repetition and conflict in the different judgments reported, and they suggested our protest against the manner of enunciating the conclusions of the Court. In such a Court, it would be well, in our view, to follow the English and United States precedents to which we have adverted, and, without making use of a "pious fraud" by concealing the dissent of any member of the court, yet not emphasizing that disagreement by reporting it at length, we would in every such case hope that the old distich might be verified:

"The judge dissents. Kind Lethe on its banks  
Receives his honour's useful gift with thanks."

## LAW SOCIETY.

## HILARY TERM, 1878.

The following is the resumé of the proceedings of the Benchers for this Term, published by authority:

The several gentlemen whose names are published in the usual lists were called to the Bar, and were admitted as Students of the Laws.

*Tuesday, February 5.*

In the absence of the Treasurer, Thomas Robertson, Esq., Q.C., was appointed Chairman.

Mr. Hodgins, from Legal Education Committee, presented the report on the

## LAW SOCIETY ; HILARY TERM.

ult of the Primary Examinations, which was received.

Mr. Hoskin, from the Reporting Committee, presented his report.

Ordered, That the same be considered Saturday next.

Mr. Crickmore, from Finance Committee, presented the yearly statement receipts and expenditure, which was ordered to be considered on Saturday.

The petition of Robert Cassidy was received and read, and referred to Legal Education Committee.

The petition from Thomas C. Rothwell was received and read, and referred to Legal Education Committee.

W. H. Scott, Esq., Q.C., was elected Benchet, in the place of E. J. Senkler, Esq., Q.C., appointed Judge of Lincoln.

Mr. Osler, from Committee on Discipline, reports *in re* a barrister, and moves, seconded by Mr. Hodgins, the adoption of the report.

Moved, in amendment, That the report be referred back to the Standing Committee on Discipline, with instructions to make further inquiry as to the advantages of claim and to the contents thereof.—Amendment carried.

Messrs. Evans and Kingsford, were appointed Examiners for Matriculation for next Term.

Mr. Hodgins gave notice that he would move, on Saturday, the 9th instant :

"That after Easter Term next all cases of defects in articles of service or passing examinations be not considered by Convocation or any Committee at the Term in which the application for special relief is made or the defect appears, but do stand adjourned until the following Term, and that the Secretary be ordered to receive no articles or petition in which defects appear."

Ordered, That Mr. Berthon be em-

ployed to paint the portrait of Chief-Justice Moss in the usual form.

Ordered, That Mr. Berthon be employed to paint a half-length portrait of the Treasurer.

Ordered, That Messrs. Meredith, Bethune and Hodgins be a Committee to meet the Attorney-General on the subject of short-hand writers, and to present a copy of the resolutions adopted on the 20th of November, 1877, and to wait on the Judges on the same subject, and to take all necessary steps for carrying out the wishes of Convocation as expressed in those resolutions.

The account of receipts and expenditure for the year ending 31st December, audited and signed by the Auditors, was laid before Convocation.

Mr. Hodgins' motion relating to defects in the papers of articted clerks, notice of which was given on the 5th instant, was carried.

Mr. Leith gave notice that at the next meeting of Convocation he would move the following resolution :

"That, in every matter wherein application be made to any of the Superior Courts, or any Judges thereof, against an attorney or solicitor for misconduct, the reporters be instructed to give in their reports the style of the matter and name of the attorney if a rule be made absolute or order made therein against the attorney for such misconduct."

*Friday, February 15.*

Mr. Leith's motion, notice of which was given on the 9th instant, was put, seconded, and carried.

Ordered, That the auditors be paid fifty dollars each for their services in auditing the accounts of 1877.

Ordered, That the usual examinations be held for next Trinity Term.

Ordered, on motion of Mr. McKelcan, that the "Supreme Court Reports" be

## LAW SOCIETY—THE TITLE OF HOLDERS OF NEGOTIABLE INSTRUMENTS

furnished to the Judges of the Superior Courts and of the County Courts of Ontario, and that one hundred additional copies of the "Supreme Court Reports" be purchased.

The petition of Thomas Rothwell and the Report of the Committee on Legal Education therein was received and read, and the first day of next term appointed for the consideration thereof.

## SELECTIONS.

## THE TITLE OF HOLDERS OF NEGOTIABLE INSTRUMENTS.

We shall next refer to the cases decided in reference to fraudulent alterations of negotiable instruments, honestly obtained—a subject well treated by the *Albany Law Journal*, in a recent paper, upon which we shall draw for some of the materials of part of this article.

The general rule, as mostly prevailing and as expressed in a recent case, may be thus stated:—Where a party to a negotiable instrument entrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to complete the same by filling up the blanks so as to perfect, in his discretion, what is incomplete; but, the authority implied from the existence of the blanks would not authorize the person so entrusted to vary or alter the material terms of the instrument, by erasing what is written as a part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was delivered: *Angle v. N.W., & Co., Ins. Co.*, 3 Central L. J. 229, and cases there cited. In *Garrard v. Hoddan* (67 Penn. St., 82, followed in *Zimmerman v. Rots*, 25 Sm. 188, *Brown v. Reed*, ante, p. 499), to which we alluded at the close of our previous paper, the maker of a promissory note in the usual form left a blank between the words "hundred" and "dol-

lars" in which the words "and fifty" were introduced afterwards without his consent or knowledge. Story's Eq. Jur. sec. 387, was cited; and *Van Duzer v. Howe*, where (the maker having left the amount in blank, with authority to fill in a certain amount, which was exceeded) Denio, J., said, "The principle which lies at the foundation of these actions, I think, is, that the maker, who, by putting his paper in circulation, has invited the public to receive it of anyone having it in possession with apparent title is estopped to urge the actual defect of title against a bona fide holder." The Court held in *Garrard's* case that, the alteration being imperceptible, the maker was liable to an innocent holder for value; observing, "He could have saved all difficulty by scoring the blank with his pen. It would have been impossible almost to have written over this without leaving traces of the alteration. In that case a purchaser of the note would take it at his risk. This is, therefore, one of the cases in which it is a maxim 'that where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss.'" The same doctrine, on similar facts, was held in *Yocum v. Smith*, 63 Ill. 421, and *Fisher v. Webster*, 8 Cal. 109; and in *Rainblot v. Eddy*, 34 Iowa, 440, where a blank was fraudulently filled up by the insertion of words imposing interest and fixing its rates. (See, also, *Brown v. Reed*, ante, p. 499; *Trigg v. Taylor*, 27 Mo. 245; *Presburg v. Michael*, 33 Mo. 542; *Gillaski v. Kelly*, 41 Ind. 158; *Inard v. Torres*, 10 La. Ann. 103; *Schryver v. Howkes*, 22 Ohio St. 308; *Radick v. Doll*, 54 N. Y. 234; *M'Grath v. Clarke*, 56 id. 34.) But in *Washington Savings Bank v. Ekey*, 51 Mo. 272—which case, however, is inconsistent with others in the same State (Missouri), and see *Shirts v. Overjohn*, ante, p. 430—where a blank in a note was fraudulently filled up so as to make the note bear interest at ten per cent., this was held to avoid the note in the hands of an innocent indorsee, although the alteration was imperceptible; and in *Ivory v. Michael*, 33 Mo. 398, the addition of the words "bearing ten per cent. after maturity" at the end of the note, was held to avoid it. So, in *Wade*

## THE TITLE OF HOLDERS OF NEGOTIABLE INSTRUMENTS.

*Washington*, 1 Allen, 561, it was held the fraudulent alteration of a promissory note by the insertion of words which make it appear to be for a greater sum than that for which it was originally made, avoids the note in the hands of a bona fide indorsee for a valuable consideration, although the alteration could not be detected on careful scrutiny. The original note was for one hundred dollars, and the words "and forty" were added, but the case does not disclose how or where, or whether the maker had not exercised due care. The Court held that, where the alteration has been made by a person holding no relation of agency to the maker, and after the instrument has been issued and delivered as a binding contract, the instrument is avoided, and that the sanction which the law give to negotiable paper in the hands of innocent purchasers does not go to the extent of rendering a party liable on a contract which he never entered into, and to which he never assented. And *Young v. Eddy*, 4 Bing. 253, was distinguished on the ground that "where one of two parties is to bear a loss, it must rest on him who employed a dishonest agent, and carelessly furnished him with the means of committing a fraud." (See, also, as to this principle, *Hern v. Stiles*, 1 Salk. 279; *Fowler v. Hollins*, 7 Q. B. 635; *Ex p. Swan*, 7 C. B. 440; *Liebkerron v. Mason*, 2 T. R. 3; *Chipman v. Tucker*, 88 Wis. 43; *Evans v. Brewer*, 2 Pick. 184; *Trigg v. Burr*, 27 Mo. 245; *Buller v. United States*, 11 Wall. 272; *Garrard v. Haddon*, *ubi supra*. In *McGrath v. Clarke*, 56 N. Y. 40, where the defendant indorsed a note at the time and place of payment in ink, and delivered it to the maker, who filled the blanks and added at the bottom the words "with interest," the Court observed, "The rule that 'whenever one of two innocent parties must suffer by the acts of the third; he who has enabled the third person to occasion the loss to sustain it,' is not applicable, for the reason that the indorser did not, in any legal sense, enable the maker to make the alteration. He endorsed a note for a specific sum, which, as we have seen, conferred no authority upon the maker to increase or alter it." And it was held that

the filling of the blanks was impliedly authorised, but that the addition of the words at the end of the note rendered it void even in the hands of a bona fide holder for value. Again, in *Holmes v. Trumper*, 22 Mich. 427, where the payee of a promissory note drawn upon a printed form added, without the maker's consent, after its delivery, the words "ten per cent." in the blank after "interest at," the Court held the note to be void, even in the hands of a bona fide purchaser for value. That conclusion, in conflict with *Rainbolt v. Eddy*, *ubi supra*, *inter alia*, is supported by *Fulmer Seitz*, 68 Penn. 237; *Worrell Gheen*, 39 Penn. St. 388; *Goodman v. Eastman*, 4 N. H. 455; *Bruce v. Westcott*, 3 Barb. 374; and see *Abbott v. Rose*, 62 Me. 194, *Kuntz v. Kennedy*, 63 Penn. 187, and the following cases, where alterations wilfully made, having an effect to alter the liability of the maker of an instrument, are held to be forgeries, and the instrument void:—*Slate v. Stratton*, 27 Iowa, 420; *Waite v. Pomeroy*, 20 Mich. 425; *Benedict v. Cowden*, 49 N. Y. 396. In *Gerrish v. Glines*, 55 N. H. 9, 3 Central L. J. 213, where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper, it was held that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a material alteration as rendered the note void in the hands of a bona fide holder. But see *Citizens' Nat. Bank v. Smith*, *ante*, p. 528; *Brown v. Reed*, *ante*, p. 499. In *Harvey v. Smith*, 55 Ill. 224, Breese, J., said: "If a person signs a note written partly in ink, but containing a material condition qualifying his liability, written only in pencil, he is guilty of gross carelessness, and if the writing in pencil is erased so as to leave no trace behind, or any indication of alteration, as it easily may be, we are of opinion an innocent holder, taking the note before maturity, for a valuable consideration, will take it discharged of any defence arising from the erased portion of the note, or from the fact of alteration."

In the State of Illinois there is a special statutable provision that "if any

## THE TITLE OF HOLDERS OF NEGOTIABLE INSTRUMENTS.

fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid (promissory notes, &c.), such fraud or circumvention may be pleaded in bar to any action to be brought by the party committing such fraud or circumvention, or any assignee of such instrument : " s. 10, ch. 98, Rev. Stat, 1874. In the cases of *Taylor v. Atchinson*, 54 Ill. 196, *Sims v. Bice*, 67 *ib.* 88, 2 Central L. J. 689, and *Comstock v. Hannah*, 7 Chicago L. N. 358, the defences were under that provision ; but the decisions arrived at possess an extrinsic interest sufficient to justify a detailed notice. *Taylor v. Atchinson* (like *Douglas v. Matling*, 29 Iowa, 498) was decided in the same month as *Foster v. Mackinnon*, but apparently without cognizance of that decision. The defendant was induced to sign the note by the fraudulent representations of the payee that it was a contract. Two papers of about the same size and appearance were signed. One of these papers was used by the payee of the note, at the request of the maker who could read, but not very well. A third party, in no way connected with the transaction, was present when the note was signed, and was a witness for the defendant on the trial. It does not appear that he was unable to read, or that he was requested to read the instruments signed. The Court conceded that at Common Law the defendant would have been liable, but placed its decision on the ground that the local statute authorized the defence. It then added : " It is, however, necessary that a person executing such an instrument, which is procured by fraud or circumvention, should use reasonable and ordinary precaution to avoid imposition, when the suit is by an indorsee before maturity. If able to read readily, he should examine the instrument, or procure it to be read by some one in whom he can place confidence. If he is unable to read readily, or does so with difficulty, then he may avail himself of the usual means of information by having it read by some person present. He cannot act recklessly, and disregard all the usual precautions, to learn the contents of the instrument, and then interpose the defence against an assignee." The Court then held, as a matter of law,

that the defendant used ordinary precaution. And the Court further held the indorsee of the note was guilty of negligence in purchasing it of a stranger without first making inquiries of the maker as to its validity. In other words it was negligent for one to buy a note from a stranger, although he knew the signature to be genuine, but not negligent for a party to sign a paper creating a kind of an obligation, trusting in the representations of the same stranger as to its contents. In *Sims v. Bice*, Jan. 1874, the defendant was procured to sign a note which turned out to be a promissory note, under the assurance that he was signing an agreement respecting his agency to sell machinery, he not being able to read the writing readily, and the proof showing that he did not sign the same recklessly, but commenced to read the paper as he signed, and was prevented by the inexperience of his team in the field where he was ploughing. The Court held the verdict finding that the execution of the note was procured through fraud or circumvention, in a suit by an assignee before maturity, was not against the preponderance of the evidence. The following doctrines were laid down : 1st. Where a party is induced to sign a promissory note under the representation and assurance that the same is an agreement appointing him agent for the sale of machinery, and a statement of his ownership of property, and he cannot read writing readily, the burden between the parties it will be upon the maker having been executed through fraud or circumvention. 2nd. Where a person executes a note he must be diligent to use all the reasonable means to prevent a fraud being practised upon him, and will be liable to an innocent purchaser before maturity. He is not required to use every possible precaution, but such as would be expected from a man of ordinary prudence. 3rd. The assignee is equally with the maker of a note bound to use proper diligence ; and agents for the sale of patent rights, or such matters, who are strangers, or who sell promissory notes taken by the maker, a prudent man would have his suspicions aroused, and in such case the purchaser ought to protect himself by inquiring of the apparent maker. From these



## THE TITLE OF HOLDERS OF NEGOTIABLE INSTRUMENTS—DISSENTIENT OPINIONS.

it seemed that the Court were disposed to carry the doctrine of *Gill v. At* (3 B. & Cr. 466, followed in *Gould v. Stephens*, 43 Vt. 125) to an extreme length, requiring the purchaser of a note to exercise even greater diligence than the maker; but, in the subsequent case *Comstock v. Hannah* (*ubi supra*), the Court said, "We find nothing in the previous decisions of this Court which would exclude us from adopting, what upon investigation we are satisfied is the correct doctrine in principle, and the prevailing rule of law;" and there the rule, formulated in the head-note, was laid down as follows:—"A party who purchases commercial paper before due, for valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a valid title; suspicion or defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the purchaser, at the time of the transfer, cannot defeat the title. That result can be produced by bad faith on his part." The Court quoted the judgment of Lord Denman in the case of *Goodman v. Harvey*, 4 Ad. & E. 870; *Goodman v. Harvey*, 20 How. 343, *Chipman v. Rose*, 12 Vt. 429, and several others of like import; and said, "We accept the doctrine of these cases as correct in principle, and the one sustained by the great weight of authority." The doctrine established in *Goodman v. Harvey* is followed in most of the States (see cases cited in note to *Rock Island Nat Bank v. United States*, 3 Central L. J. 6); and has been adopted in the recent case of *Johnson v. Bank of Montreal*, p. 459, of which, and *Dresbach v. M. & T. R. Constr. Co.*, ante, p. 460, and *Hamilton v. Marks* (51 Mo. 78, which will be printed in our next issue), no special notice is here unnecessary.

From the foregoing statement it appears that there is a notable absence of uniformity in the American adjudications as to the rule of the law-merchant, or at least as to its application, in reference to the subject of those papers. All, or almost all those cases, numerous as they are, have been decided within the last decade, and perhaps their want of uniformity is owing to the circumstance

that the leading cases were decided about the same period and without reference to each other. But, be the cause what it may, the conflict is to be deplored. Mercantile law is a system of jurisprudence recognised by all nations, and demands, as far as practicable, uniformity of decision throughout the world; and the use of negotiable instruments deserving to be encouraged by the law on account of their universal convenience in mercantile transactions, any conflict of adjudications tending to create distrust would be calamitous in the highest degree, even as any course of judicial decision calculated to restrain or impede their unembarrassed circulation, would be contrary to the soundest principles of public policy. The recent cases, however, published in our columns, appear to us to be worthy of special consideration, as tending to establish, to the fullest extent, the integrity of commercial paper, and to prevent injury to innocent parties who cannot be charged with any want of care or caution; while upholding the salutary principle that, where one of two persons must suffer, it must rather be he through whose negligence the exigency has been occasioned. And considering that without the aid of such instruments as a circulating medium, commerce, in the proportions to which it has now attained, could not subsist; and that to fetter their negotiability, while tending to ostracise them from the exchanges of the world, would not tend in the direction of those substantial benefits which flow from a specie monetary basis; we trust that the reasoning of the able jurists of the United States, fortified by the plain dictates of public policy, will be deemed not without weight in this country also, and that on questions so profoundly affecting one of the leading evidences of commercial credit a "common jurisprudence" may yet, in the words of Lord Cockburn, "assist to cement the bonds of international amity."—*Irish Law Times*.

## DISSENTIENT OPINIONS.

Last week, referring to the suggestion of a contemporary, that dissentient opinions in the Supreme Court should be sup-



## DISSENTIENT OPINIONS.

pressed, we remarked that such a course seemed to us objectionable as being deceptive in itself, as unfair to dissentient Judges, and calculated to retard the progress of the science of jurisprudence. That it would be a deception admits, we think, of no doubt. What would be the object of suppressing the dissent if not to present the appearance of unanimity? And if the Court be made to appear unanimous when it is not so, somebody must be deceived or misled by the artifice. Now, however good the end in view, we cannot think it should be attained by misrepresentation. The day for such pious frauds is past. But it may be said, there is no deception because the judgment is not represented to be more than the judgment of a majority. If so, that numerous class of judgments in which the Court is actually unanimous loses in force just as much as the non-unanimous judgments gain through the failure to state exactly how the Court stands. The force of important enunciations of principle may be weakened by the whisper or the surmise that the principles laid down by the Court are the views of a bare majority. The Court will often be supposed to be at variance when it is perfectly agreed, and Judges who fail to state their opinions from the bench at the time the judgments are delivered may improperly be counted as dissentients.

This leads us to the second ground of objection above stated—that the suppression of dissent is unfair to the Judges themselves. The minority may be condemned by such a rule to remain silent while a doctrine of which they are convinced that time will demonstrate the unsoundness, is proclaimed from the bench by their colleagues, and no disclaimer will be possible. How often in the past has an erroneous principle obtained judicial sanction for a time until the strong light of criticism and debate has exhibited its weakness and led to its rejection? Surely the minority in such a case would be justified in taking some means to let the world know that they are not to be held responsible for the error. Number does not always constitute strength, and the minority may be men of extraordinary powers, while the

majority are quite the reverse. Even where the decision turns on a question of evidence, an injustice may result from the suppression of dissent. For example, the decision of the majority may attach a serious imputation of fraud to an individual. Is not the latter entitled to the benefit of the statement that certain members of the Court did not share in a view which dishonours him? In an election case, the judgment of the majority may disqualify a member of Parliament. Are the minority to refrain from expressing their disbelief of the evidence on which the majority have based a serious a condemnation?

The third ground of objection, that the suppression of dissent would retard the progress of the science of jurisprudence, appears to us to be equally clear. If the dissentient opinions are unsound, it is better, nevertheless, to put them on record. Their unsoundness will become more and more apparent, the longer they are scrutinized and canvassed. On the other hand, if the dissentient opinions are the sounder of the two, their suppression can only have the effect of giving to error the mantle of increased authority. It will be more difficult to correct the error; but *magna est veritas*—in the end the truth will get the upper hand, however obstinately the vicious precedent may fight for existence and respect. We cannot find any words in which to describe this disintegrating process so aptly as those employed by a Westminster Reviewer some years ago, in referring to the obstruction to justice caused by a bad decision. "Judges," says this writer, "are not infallible, and though actuated by the purest intentions, they sometimes decide wrongly. Such decisions are, nevertheless, available for citation, like all other precedents. Now, when an erroneous decision in the past comes to be pressed upon a Judge in the present, one of two things must happen—either precedent must be followed, or it must be disregarded. The traditions of the profession point in one direction, while the instinct of justice exercises its influence in the opposite. The result is oftentimes a compromise. The decision is in effect disregarded, but its authority is saved by recourse being had to some shadowy and

## DISSENTIENT OPINIONS—SELECTIONS.

tious distinction. This practice has recently satirized by a living Judge, who, in a case which we will call "Brown v. Robinson" being cited in argument, informed the bar that he should not feel himself bound by that case unless a suit was brought before him in which the facts were precisely similar; 'indeed,' added his ship, 'unless the plaintiff's name be Brown, and the defendant's Robinson.'

The suppression of dissentient opinions would greatly aggravate the mischievous consequences of an erroneous precedent. However unsound a decision might be shown to be, it would be hard to get over unless legislative action was invoked; the growth of the science of jurisprudence would be stunted correspondingly.

Judges are to be present at the rendering of the judgment, and to refrain from indicating their dissent from the reasons which may be expressed, the decisions of the highest tribunal will tend to resolve themselves into a mere vote of majority or nay upon the judgments submitted to them. As soon as the fact has become known during the deliberation that a majority of the Court are inclined one way or the other in any particular case, the other members of the Court will have little encouragement undertake to an anxious examination of the questions involved, knowing, as they do, that it is their duty in vain, as they will be debarred from stating the conclusions at which they may arrive.

To conclude: instead of adopting a rigid rule, is it not preferable to leave it to the discretion and wisdom of the Judges themselves to decide when they shall yield their individual opinion and refrain from entering a dissent? Are they so well qualified as they to appreciate the importance of certainty in the law, and the advantage, where it can be obtained without the sacrifice of strong convictions, of presenting a harmonious judgment? For our part, with a vivid realization of the mischief caused by decided or hasty dissents, we are still disposed to favour a straightforward policy, and the consequences what they may.—*Legal Notice.*

It is suggested that judges may be relieved very much by the use of certain aids which, though not heretofore adopted, are practical and proper. The greater part of the labour connected with the determination of a case consists in (1) the collocation of the authorities bearing upon the issues involved in it, and (2) the writing out of the results of such collocation. In other words, looking up cases, and writing opinions, constitute a considerable part of the judicial work. Now the case law bearing upon the points argued in any cause could be looked up and arranged by any good lawyer, so that all the judge or court would have to do would be to apply the same. This could be done in an opinion delivered orally, and written down by a stenographer. A practice something like this we understand prevails, to some extent, in England. The magistrates have clerks who prepare the argued cases for decision, and the opinion, when is given, is delivered *via voce*. Such a plan might at first work awkwardly, but we are confident that once fairly tried, there would be no return to the one now in vogue. Not only would the judges be relieved of much drudgery, but they could dispose of business much more rapidly, and thus more nearly accomplish the duties which are imposed upon them. It is at least worth while to make a trial of the system suggested. That now in use certainly is the proper one.—*Albany Law Journal.*

It has recently been held by the Supreme Court of the United States, (in *Good v. Martin*) that when a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is an original promisor, guarantor, or indorser: (1.) If he put his name in blank on the back of the note to give the maker credit with the payee, or if he participated in the consideration of the note, he is held as joint maker; (2.) If subsequent to the making and delivery of the note he did the act in pursuance of a contract between the maker and payee for forbearance, he is held as guarantor; (3.) If he did it with the understanding of all parties that the note was to be inoperative until indorsed

C. of A.]

NOTES OF CASES.

[C. of A.]

by the payee, he would be held liable only as second indorser. The presumption where such an indorsement is made in blank, is, that the party is liable as maker or guarantor. Where the party is held as a promisor or a second indorser, it is not necessary to allege or prove any other than the original consideration, but if it is attempted to hold him as guarantor, a distinct consideration must appear.—*Ex.*

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

From C.C. York.]

[February 20.]

RE WALLS &amp; CO.

*Insolvency.*

This was an appeal by joint creditors of the insolvents against an order confirming the deed of composition and discharge. The objection to the deed was, that it did not provide for separate creditors, of whom there were two, viz.: The Stadacona Fire Insurance Company, and the Huddersfield Banking Company. The Stadacona Company proved for a sum due for calls on stock which stood in the name of T. Walls, one of the insolvents. Pending proceedings for the confirmation of the discharge, a friend of the Insolvents, for the purpose of removing the objection, took a transfer of this stock, which was shown to be of no value, and paid off the calls: *Held*, that the effect of this transaction was the extinguishment of the debt, and that the deed was not invalidated, because it did not provide for the payment of this debt. The Huddersfield Bank claim was due by the firm and fully secured by a mortgage on the partnership assets, which contained T. W.'s covenant to pay the money: *Held*, that although this was a separate debt, it did not come within the principle which vitiates a deed of composition on the ground that the separate creditors are not provided for, since by resorting to the mortgage security the

Bank would only take what was theirs already, while if they took a different course, and enforced payment from other assets they set free the mortgaged property.

The deed of composition was filed with a certificate from the assignee under sec. 52, dated 21st November, 1877. It stated that the total number of proved claims of \$100 and upwards was thirty-four, and that the number who had proved for that amount, and who had executed the deed, was thirty-one. The deed, however, as produced, had the signatures of fifty creditors, and from the affidavit of execution it appeared that all these had signed before the date of the certificate. There was nothing in the papers or the evidence of the assignee to explain the discrepancy between the numbers in the deed and the certificate. *Held*, that the deed was void, as it did not appear that it had been executed by a sufficient proportion in number and value.

The deed was executed by procuration, but with the exception of a few cases no authority to execute was shown. The assignee swore that nearly all had accepted the composition under it, but it did not appear that he had paid it directly to the creditors, or had their acknowledgment for it, or that those to whom it was paid had power to ratify the Deed by accepting the composition. *Held*, that as neither power to execute or to ratify was shown, the deed was void.

*Held*, that the mere fact that no objections to the deed of composition were filed with the assignee, in compliance with sec. 51, does not compel the judge to confirm the discharge under sec. 54.

The affidavits of justification and of the execution of the appeal bond were made before a commissioner in B. R.; they were entitled in the matter of the insolvency, and referred to the Insolvent Act of 1875 and amending Acts.

*Held*, that it was no objection that they were not entitled in any court.

The accuracy of styling insolvency proceedings in the County Court questioned.

The bond recited the judgment as being in a matter under the Insolvent Act of 1875.

*Held*, that even if a reference to the amending Acts had been proper, its absence would not have invalidated the bond so long as there was sufficient to show without ambiguity that was the particular decision attacked by the appeal.

The condition of the bond was that the ap-

ant would "prosecute" the appeal instead of "duly prosecute" as required by sec. 128 *Held*, that the omission of the word "duly" is immaterial.

Several creditors, who are not interested in the debts due to each other may join in one appeal.

In computing the eight days within which the order of appeal must be adopted for an appeal under sec. 128, the day on which the final order or judgment is rendered is excluded.

The effect of sec. 124 of the Insolvent Act of 1875 is to continue the rules of practice in secs. 84 and 85 of the Insolvent Act of 1869, as modified by sec. 128 until they are repealed by others.

The appellants completed their security and filed the application and notice within the eight days, but failed to notify the assignee. It is held that they must be considered as "having completed proceedings" within the meaning of sec. 128; but the appellants were ordered to pay the assignee.

*S. Ewart*, for the appellants.

*C. Ferguson*, Q. C., (with him *Monkman*), for the respondents.

*Appeal allowed.*

[C. P.]

[March 4.]

*McEDWARDS, ASSIGNEE, v. PALMER.*

*Insolvent Act 1875, secs. 130, 132, 134—Preference.*

The insolvent, six months before an attachment in insolvency issued against him, conveyed his equity of redemption in certain lands to the defendant upon trust, to sell the same and apply the proceeds, after payment of a mortgage thereon, in payment of pre-existing debts due to the defendant and one T., and to pay over the surplus, if any, to the insolvent. The defendant sold the land subject to the mortgage, and paid himself and T. out of the proceeds. It did not appear what other property the insolvent had at the date of the deed, or what other debts he owed. The estate, however, which came into the hands of the assignee, consisted of a watch, and the claims recovered amounted to \$277.80. The evidence did not shew that the deed was made in contemplation of insolvency.

The learned Judge at the trial found that there was no fraud or preference in the making of the deed, and that it was a *bona fide* transaction.

*Held*, that the deed was not under sec. 132, and the evidence did not shew that creditors

were injured, obstructed, or delayed; nor under the 133rd sec., as it did not appear that it was an unjust preference, or made in contemplation of insolvency.

*M. C. Cameron*, Q. C., and *Oeler*, Q. C., for the appellant.

*Kerr*, Q. C., and *Boyd*, Q. C., for the respondent.

*Appeal allowed.*

From Chy.]

[March 4.]

*INGLIS v. BEATTY.*

*Executor—Annual rest.*

The rule upon which the Court acts in charging interest rests upon the basis of compensating the *cestui qui* trust and depriving the trustee of the advantage he has wrongfully obtained.

An executor will not necessarily be charged with compound interest in all cases except those in which there is a mere neglect to invest.

Where an executor retained a portion of the trust money under the belief that it was his own and had acted on that supposition without objection from those interested under the will—and it did not appear that he had used the money in business,

*Held*, reversing the decree of Blake, V.-C., that under the circumstances he was only chargeable with simple interest.

*C. Moss* for the appellant.

*J. A. Boyd*, Q. C. (with him *W. Cassels*), for the respondent.

*Appeal allowed.*

From Chy.]

[March 4.]

*WILSON v. BEATTY.*

*Will—Construction of.*

A testator devised all his estate to his issue—if a son, on attaining the age of 25 years, and if a daughter, on her attaining the age of 18 or marriage, "and in the event of there being no such issue of the said marriage of myself and my said wife, *born, or if born, not living within one year from my decease,*" then over.

A few weeks after the testator's death, his widow had a son, who lived only a few days.

*Held*, that the gift over must take effect as there was no child living at the end of the year.

*J. A. Boyd*, Q. C., (*Donovan* with him), for the appellant.

C. of A.]

NOTES OF CASES.

[C. of A.]

The *Attorney-General* (O'Donohue with him), for the respondent.

*Appeal dismissed.*

From Chy.]

[March 4.

THE CANADA FIRE INSURANCE CO. V. THE  
NORTHERN INSURANCE CO.

*Reinsurance—Misrepresentation.*

The plaintiffs, by their bill, sought to have one of their policies by which they reinsured the defendants for the amount of a policy of \$2,800, declared null and void on the ground that they had been induced to accept the risk at seven per cent by a fraudulent representation by the defendants' agent that the rate at which the defendants had insured the property was seven per cent; whereas, in fact, it was eight, and that the other insurance companies, holding risks on the same property, had reduced their rates from eight to seven per cent.

It appeared that when the plaintiffs' agent accepted the risk in November, 1875, he was well acquainted with the property and every circumstance which it would be necessary to consider in determining whether to accept the risk. He renewed the risk on the 10th March, 1876, at 8 per cent, but on the 25th April he alleged that he was induced to accept 7 per cent, owing the above misrepresentations.

*Held*, that even if these representations were made, they would, under the circumstances, afford no ground for avoiding the policy, inasmuch as the defendants had already accepted the policy, and the alleged misrepresentation only had the effect of inducing them to take a lower premium.

One of the conditions of the policy was: "This reinsurance is subject to the same specifications, terms and conditions as policy No. of the Northern Assurance Company which it reinsures, it being well understood that the Northern Assurance Company do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least thereto, on other parts" of the property.

It happened that before the fire occurred, a policy of the defendants expired and was not renewed, so that at the time of the fire they had only risks over and above their reinsurance to the amount of \$2,600.

*Held*, that the defendants had not violated the condition, as the effect of it merely was

that defendants were to retain, or, in other words, to forbear to reinsure the stipulated proportion.

*Held*, also, that the difference of the rate of premium was not such a departure from the "specifications, terms and conditions" as to violate the policy.

Boyd, Q. C., (with him C. Moss), for the appellants.

Ferguson, Q. C., (with him G. Patterson for the respondents.

*Appeal allowed.*

From C. P.]

[March 4.

O'CONNOR V. BEATTY.

*Deed—Investigation of title—Dower.*

On a sale of land, the deed and mortgage back were executed by the vendor and purchaser, and left with one K until their respective wives should come in and bar their dower: nothing, however, was said as to title. The defendant went into possession of the land, made a payment on the mortgage, and endeavoured to raise money on the land, when he discovered (after he had been in possession four years) that there was a defect in the title.

*Held*, that he was entitled to have a release of dower; but that he had waived his right to demand an unlimited inquiry as to title.

McCarthy, Q. C. (Pepler with him), for the appellant.

Lount, Q. C., for the respondent.

*Appeal dismissed.*

From C. C., York.]

[March 4.

SMITH V. HUTCHISON.

*Insolvent Act 1875, secs. 133 and 134.*

A payment by an insolvent in the ordinary course of business, within thirty days before an assignment or the issue of a writ of attachment is not void under section 134 of the Insolvent Act of 1875, unless the payee has actual or constructive knowledge of the insolvent's inability to meet his engagements in full; nor can such a payment be avoided under section 133, by shewing that it was made in contemplation of insolvency, and that it gave the debtor an unjust preference, as a payment in money does not come within that section.

W. A. Foster, for the appellant.

Ross, for the defendant.

*Appeal dismissed.*

A.]

NOTES OF CASES.

[Elect.

Q. B.]

[March 4.]

BACON V. HAYES.

*Covenant not to assign—Breach—Forfeiture—Waiver.*

plaintiff leased land for ten years, from December, 1871, to one D, who covenanted either he nor his assigns would assign, or sub-let the premises without the F's consent in writing first obtained, proviso for re-entry. D mortgaged his land to one H, to secure him against his payment of a note for D, the proceeds of which he used in converting the premises into a race and pleasure grounds, and erecting buildings thereon. The note being dishonoured, he demanded the plaintiff of the mortgage, and on the plaintiff's absence it had been foreclosed without his consent, whereupon the plaintiff waived all objections on this ground, and declared that he would take no advantage of his omission, and H then paid the note and the costs expended a large sum in foreclosing the mortgage and improving the premises.

After being foreclosed, advertised the land for sale. One W took possession in 1874 on the understanding that he was to have the place for ten years, with the privilege of remaining on the whole of the original term, at a rent of £100 per year, and there was to be a written agreement to be drawn up if possible so as not to interfere with H's lease. W remained ten months on the improvements, and while in possession let part of the land to one C for \$300 per year. W gave up possession to H in April, 1875, not being able to obtain the written agreement which had been promised him; and on arbitration with H, the arbitrators awarded \$524 in full for improvements, "less the rent for," on which basis they set-

affirming the judgment of the Queen's Bench that what took place between H and W was a breach of the covenant.

It was also that the plaintiff had waived the breach caused by the mortgage to H.

*Per curiam*, Q. C. (Monkman with him), for the plaintiff.

*Per curiam*, Q. C. (E. Crombie with him), for the respondent.

B.] [March 4.]  
N. V. GORE DISTRICT MUTUAL INSURANCE COMPANY.

*Insurance—Knowledge of Agent—Estoppel.*  
that the knowledge of a double insur-

ance by the agent did not estop the Company from setting up such double insurance to defeat the plaintiff's claim.

*Bethune*, Q. C., for the appellant.

*Strathy*, for the respondent.

*Appeal allowed.*

From Chy.]

[March 4.]

CHRYSLER V. MCKAY.

*Sale of land for taxes—Taxes not in arrears for five years—32 Vict., cap. 28, sec. 155.*

When it appears that no portion of the taxes on the land have been over due for the period prescribed by the Statute under which the sale took place, the sale is invalid; and the defect is not cured by section 155 of 32 Vict., ch. 36, as it only applies to defects in procedure.

Where there is *prima facie* evidence of arrears, it must be shown affirmatively that the arrears were not sufficient to authorize the sale.

*Bethune*, Q. C., for the appellant.

*MacLennan*, Q. C. for the respondent.

*Appeal dismissed.*

## ELECTION COURT.

Before PATTERSON, J. A., and BLAKE, V. C.

[March 1.]

RE LINCOLN ELECTION.

*Voters' list—Income—Description.*

*Held*, that a Judge has no power to add to the voters' list, in the revision thereof, names of persons as voters in respect of income, who were not assessed for income on the last revised assessment roll.

*Held*, also, that a sufficient description of the real property on which the qualification of a voter depends, must appear on the voters' list in all cases of additions thereto, where it does not appear on the assessment roll.

*Hodgins*, Q. C., for the petitioner.

*Bethune*, Q. C., for the respondent.

[March 2.]

RE LINCOLN ELECTION.

*Admissions.*

The respondent, who was conducting the case, against the claim of the petitioner to the seat, and the attorney and counsel for the petitioner consulted as to the extent to which they could mutually admit without inspection of the ballot papers how certain voters had voted, and as the result they stated to the Re-

Elect.]

NOTES OF CASES.

[Q. B.]

gistrar that they had agreed that 22 whose names were mentioned had voted for the respondent, and four for the petitioner, and that there were 15 others as to whom they had not been able to agree, but proposed to consider them further. Subsequently the respondent objected to the Registrar acting on these admissions, on the ground that he had only accepted the agreement conditionally upon it extending to the 15 votes which had not yet been decided, and also that he had no power to bind the constituency by his admission.

*Held*, that the admissions were properly received as evidence of the facts.

*Hodgins*, Q.C., for the petitioner.

*Bethune*, Q.C., for the respondent.

[March 4.]

## RE LINCOLN ELECTION.

*Contempt—Publication.*

All the powers which the Court of Queen's Bench possessed with respect to Controverted Elections were transferred to the Court of Appeal by section 2 of 38 Vict., c. 3; the latter Court, therefore, has now the power to punish for commissions of contempt in election cases.

Pending an election scrutiny, the publisher of a paper at St. Catharines, where the scrutiny was being carried on, copied a letter, which purported to have been written by the respondent, from the daily *Mail* of Toronto, commenting very severely on the character and evidence of the petitioner's witnesses, as well as on the motives of those prosecuting the petition. Upon a motion to commit the publisher for contempt of Court, he filed an affidavit stating that the letter in question was an answer to an editorial which had appeared in the *Globe* newspaper, charging the respondent with having improperly interfered with the voters' list before the elections, and reflecting on his conduct in such a manner as to do him serious injury in St. Catharines, where he lived; that he had published the letter as a simple act of justice to the respondent, and without his knowledge or consent. He further denied any intention of giving any offence to the Court or of interfering with the fair trial of the case.

*Held*, that the publication contained expressions which amounted to a contempt of Court, but under the circumstances the Court refused to make any order.

*Hodgins*, Q.C., moved the rule absolute.

*M. O. Cameron*, Q.C., shewed cause.

## QUEEN'S BENCH.

## VACATION COURT.

Gwynne, J.]

[February 22]

## REGINA V. LAWRENCE.

*Conviction—Tampering with witnesses—Rev. Stat. cap. 181, sec. 57—Local Legislature—Ultra vires.*

A conviction under Rev. Stat. ch. 181, sec. 57, for tampering with a witness, was quashed on the ground that the section was *ultra vires* of the Local Legislature, because tampering with a witness was a crime—subornation of perjury—at common law (or if not at common law, then made a crime by the section), and being a crime, sec. 91 of the B. N. A. Act gave the exclusive jurisdiction to the Dominion Legislature.

*Fenton*, Co. Attorney for the Crown.

*Blackstock* for defendant.

[This matter was re-heard before the full Court, and the judgment affirmed.]

Galt, J.]

[March 5]

## SCHLESINGER V. DAVIS.

*Guarantee—Release by acts of parties—Married woman—Separate estate.*

Demurrer: Declaration against defendant for payment of rent by W.

Plea: That after the making the guarantee and after the accrual of the rent sued for, the plaintiff and W., without the consent or knowledge of defendant, agreed to surrender, and did surrender, the lease, &c. &c.; and before and at the time of such surrender, &c., there were goods and chattels and W. on the premises liable to distress.

*Held*, that the plea shewed a good defence as the sureties were discharged by the dealings of W. and the plaintiff.

There was also a plea that defendant was a married woman.

Replication: That at said time defendant had separate estate liable, &c.

*Held*, replication insufficient.

*J. K. Kerr*, Q.C., for plaintiff.

*Oster* for defendant.

Galt, J.]

[March 12]

## TAYLOR V. PARNELL.

*Work and labour—Infancy—Statute of limitations.*

The plaintiff declared on the common in debitatus counts.



that the alleged cause of action did not within six years.

ication that the plaintiff was an infant the cause of action accrued, and he t his action within six years after coming age.

nder that plaintiff, when he entered e contract and performed the work, &c., er sixteen years of age, and did not reth his parent or guardian, and that unthp Act as to apprentices and minors, Rev. Ont.), chap. 135, s. 5, he could sue in ne manner as if he were of legal age.

his rejoinder the plaintiff demurred, on ound that the fact that the plaintiff was id to sue before he came of age did not e him of the benefit of the Statute of tions, and that he had, after coming to e of twenty-one years, a further period of ars within which to bring his action.

7, that the object of the Revised Staphap. 135, s. 5, clearly was to make the liable on the contract without the inter-n of his parent or guardian: that the e did not extend further or remove alto-the disability of infancy, or prevent the e of Limitations applying in favour of the , and that the six years were counted, om the accruing of the cause of action, om the attainment by the infant of the f twenty-one years.

gment for plaintiff on demurrer.

R. Clarke for the demurrer.

Michael, Q.C., *contra*.

#### IN BANCO—HILARY TERM.

MARCH 15.

UEBOTTOM V. NORTHUMBERLAND ET AL.  
e judgment herein, of which a note was ashed at page 82 of this volume, adopted affirmed.

Cameron, Q.C., for applicant.

thune, Q.C., and Osler, *contra*.

#### FORD V. GOURLAY.

*Seduction—Action by master.*

ld, in an action by a master for the seduc-of his servant, whose parents were dead or of the country, that the masters' damages not restricted to actual loss proved, but the jury might look at the circumstances,

the effect on the master's family, &c., and give exemplary damages.

Durand for plaintiff.

J. K. Kerr, Q.C., for defendant.

#### COMMON PLEAS.

#### IN BANCO—HILARY TERM.

MARCH 9.

#### THE BANK OF OTTAWA V. HARRINGTON.

*Promissory note—President of club—Liability.*

The first count of the declaration was against defendant as maker of a promissory note, as follows:—Two months after date the Carleton Club promise to pay to the order of B., at the Ontario Bank, Ottawa, \$497.66, for value received. There were two other counts on similar promissory notes. The fourth count alleged that defendant promised and undertook with the plaintiffs that he had authority from the members of the Carleton Club to make, sign and deliver the said several notes, and that if plaintiff would discount them they would be fully paid and satisfied by said members, with averments that the members never authorized defendant by by-law, resolution or otherwise, to make the notes for or on their behalf, and such members have refused to pay or be held responsible for the same.

The learned Judge, at the trial, found that the defendant was not liable on the first three counts as maker of the notes, and this was not moved against.

*Held*, that defendant was not liable under the fourth count: that, as a mere conclusion of fact, the evidence failed to establish the allegations therein; that a liability could only arise as a legal conclusion from the fact, as was contended by the plaintiffs, of 37 Vic., ch. 34, O., under which the Carleton Club was incorporated, not authorizing the making of notes; but this being a matter equally known to the plaintiffs as to defendant, and upon which they could exercise their judgment, no liability would arise; that even if the legal effect of defendant's act was to warrant that he had the members' authority to make the notes, the evidence rather shewed that such authority had never been disputed or repudiated.

Bethune, Q.C., for the plaintiff.

Robinson, Q.C., for the defendant.



**CLORE ET AL. V. BEATTY ET AL.***Carriers by water—Delivery of goods—Liability—Pleading.*

Action to recover the value of certain goods shipped on board defendant's steamer to be carried to the port of Thunder Bay, on Lake Superior, and there delivered to the plaintiff's or their assigns, averring non-delivery.

Plea: That defendants carried the goods to Thunder Bay, and there being no person there on the plaintiff's behalf to receive the goods or to whom notice of their arrival could be given, and no means of notifying plaintiff's who resided at a certain distance from Thunder Bay, the defendants, after waiting a considerable time, landed the goods at the only wharf at Thunder Bay, they having no wharf or warehouse of their own, nor was there any other warehouse where they could store the goods: that they were placed under the charge of the person having charge of the wharf so far as he would consent to take charge.

*Held*, affirming the judgment of Armour, J., that the plea afforded no defence to the action.

*Robinson, Q. C., and Biggar* for the plaintiff.

*McMichael, Q. C.*, for the defendants.

**JOHNSTON V. WILSON.***Agreement—Statute of frauds—Sale of goodwill of hotel and furniture.*

The plaintiff was the lessee of an hotel in the Village of Winham, and had a license to sell liquors, and was owner of the furniture therein. In April, 1876, defendant came to Winham and examined the premises, and negotiated as to the purchase of the plaintiff's lease goodwill, license, &c., and the furniture at a valuation; but nothing was done, and defendant left, promising to write. On the 2nd of May he wrote plaintiff, offering \$600 for plaintiff's right, and would take stuff at a valuation, and would pay \$1,500 down; or if plaintiff greatly claims it \$2,000. On May 4th, he again wrote, offering \$700 for right, including license, and would pay \$2,000 down, and balance in October, when certain notes he held would fall due. On the same day plaintiff telegraphed defendant that he would take \$700 for his right, \$2,500 down, and time for balance; but on May 8th he again telegraphed defendant that he would take \$700 for his right, defendant paying license, \$2,000 down, and time for balance. On the same day, defendant telegraphed in reply, "Yours re-

ceived; will take it." The defendant has refused to carry out the agreement, plaintiff sold out his right, &c., which only brought \$325, and also sold the furniture, &c., at a valuation.

*Held*, that there was a sufficient contract within the Statute of Frauds; that there was no uncertainty in the expression, "time for balance," as the previous correspondence shewed that October was intended; and the parol evidence sufficiently shewed that the plaintiff was intended by the word "stuff." The plaintiff was, therefore, held entitled to recover \$375, the difference between the \$700 and the price for which the goods were sold, but not to any damages on the furniture, as it had been sold at a valuation.

*Robinson, Q. C.*, for the plaintiff.

*Oster* for the defendant.

**SAMIS V. IRELAND.***Mortgagor and mortgagee—Judgment recovered on mortgage for mortgage debt—What sale under s. fa. lands.*

Where a mortgagee recovered judgment against the mortgagor for the mortgage debt, and a s. fa. lands issued thereon, under which not only the equity of redemption in the mortgaged lands consisting of 25 acres of a certain lot, but also the remaining 75 acres of the lot belonging to the mortgagor were sold, the mortgagee being the purchaser, the only consideration being the mortgage debt.

*Held*, that the sale was void as to the 75 acres.

*Bethune, Q. C., and J. W. Kerr*, for the plaintiff.

*Boyd, Q. C.*, for the defendant.

**SYLVESTER ET AL. V. MCCUAIG.***Claims for wharfage—Agreement to take stock in projected company to acquire vessel—Effect.*

The defendant and one H. who were interested in an engine, for the purpose of utilizing it, agreed that a steam vessel should be purchased and a company formed under the Ontario Joint Stock Companies' Act of 1874, with a capital of \$30,000 in shares of \$100 each, of which this vessel was to be the property. The vessel was built at Mill Point and registered in defendant's name, and several mortgages were given by him upon her. In March, 1876, while the vessel was being finished, plaintiff, at the solicitation of defendant H., agreed to become a stockholder in the projected company and take \$500 stock upon

ment to use plaintiff's wharf for the vessel the wharfage being fixed at \$300, and plaintiffs executed a document prepared for registration by intending stockholders, and gave notes for \$250 each, at three and six months, the first of which plaintiffs paid, but the latter. The vessel was brought to Toronto and ran between Toronto and the Niagara River, using the plaintiffs' wharf as agreed. Some \$9000 stock was subscribed, and the meeting of stockholders held and resolutions passed as to the formation of the company, appointing defendant H. and one B. trustees to receive a conveyance of the vessel in trust for the company until formed. It was admitted that the Ontario Act did not authorise the formation of the company, which was never completed, nor was there any conveyance of the vessel to the trustees, in fact the whole project appeared to have been abandoned. The plaintiff not having been paid the \$300, being the wharfage for the season of 1876, which was charged against the vessel, sued defendant as charter owner.

*Held*, that they were entitled to recover: that the plaintiffs by their subscription for stock, under the circumstances, could not be deemed to be co-owners or co-partners in the vessel; nor could defendant set off the amount of plaintiffs' stock note, for not only had the consideration of the note wholly failed; but that it would be a charge alone between the plaintiffs and the company, if formed.

*MacLennan*, Q. C., and *Biggar*, for the plaintiffs.

*Robertson*, Q. C., for the defendant.

#### BUNKER V. EMMANY.

*Mortgage—Verbal assent of mortgagee to parting with goods—Effect of in equity—Absence of redemption clause.*

The plaintiff, J. B., executed a chattel mortgage to H. B., of certain goods stated to be in the mortgagor's possession, with defeasance on payment within a year, but without a redemption clause. It contained the covenants for payment, entry on non-payment, or in default the mortgagor should attempt to sell or dispose of or in any way part with the possession of the goods or any of them or remove the same, &c., without the written assent of the mortgagee first had and obtained. The usual stipulation as to putting the mortgagee in possession was struck out. H. B. assigned to the defendant. Subsequently J. B. claiming

to have the defendant's verbal assent sold some of the goods to H. B., when the defendant entered and took the goods. In an action by the mortgagor for such taking.

*Held*, that defendant was entitled to the goods: that even if in equity a verbal assent is sufficient when it is admitted or clearly proved to have been given and acted upon, the evidence here failed to clearly establish that such assent was ever given.

*Held* also, that even if the plaintiff were entitled to recover, it could only be to the extent of his interest in the goods.

*Quære*, as to the effect of the absence of the redemption clause on the particular form of this mortgage.

*M. C. Cameron*, Q. C., for the plaintiff.

*Hector Cameron*, Q. C., for the defendant.

#### BICKFORD V. THE GREAT WESTERN RAILWAY COMPANY.

##### *Contract—Performance—Evidence.*

The plaintiff sued the defendants on an alleged contract between the plaintiff and defendants under which the plaintiff was to deliver to the defendants 540 tons of new steel rails in exchange for 2970 tons of old iron of specified description; alleging that the plaintiff had delivered to the defendants the new rails, but that the defendants had not delivered to the plaintiff old iron in accordance with the contract, but of an inferior quality, whereby &c.,

It was *held* that the plaintiff could not recover; that the evidence showed that the only contract upon which defendants could be held liable, and which was contained in a letter written by defendants' managing director, had been fully performed, while a different contract attempted to be set up by the plaintiff, and contained in his reply to the above letter, had never been accepted by defendants.

*Hector Cameron*, Q. C., and *G. D'Arcy Boulton*, for the plaintiff.

*Robinson*, Q. C., and *McMichael*, Q. C., for the defendants.

#### JENKINS V. STRONG.

*Title by possession of part of adjoining lot—Excluded by acts and conduct from setting up title against purchaser of adjoining lot.*

In 1836, the plaintiff became the owner of lot 22, in the fourth concession of Verulam, and occupied by mistake as part of lot 22, the land now in question, being part of lot 23, and

C. P.]

NOTES OF CASES.

[C. P.]

containing about 4 acres. In 1838, he cleared and fenced it as part of lot 22. In 1868, defendant's son purchased lot 23, and in 1875, sold it to defendant, the land in question still continuing, and for a long time thereafter, within the plaintiff's fence.

*Held*, Gwynne, J., doubting, that there was nothing in the evidence, as set out in the case, to shew that plaintiff by his acts or conduct had ever led to the belief that he did not intend to assert his possessory title to the land in question or that he had abandoned it so as to estop him in equity from afterwards claiming it.

*M. C. Cameron*, Q. C., for the plaintiff,

*Hector Cameron*, Q. C., and *J. Barron* for the defendant.

#### THE MERCHANTS' BANK v. BOSTWICK.

*Promissory notes—Mortgage as collateral security for mortgagor's indebtedness—Liability.*

In May, 1873, a firm of H. & B. being indebted to plaintiffs' bank to \$80,000, and requiring security therefor, B. executed a mortgage on his real estate for that amount, the mortgage reciting that it was for money lent on notes made by B., and endorsed by defendant and Mrs. P. In October, the indebtedness having increased to \$90,000, the bank required further security, and notified defendant and Mrs. P. of the fact, valuing B.'s mortgage at \$40,000. It appeared that B. had been signing defendant's and Mrs. P.'s name as endorsers to the notes, as he stated, with their consent, which defendant denied, stating that the notice from the bank was his first intimation of it. The bank required a mortgage from defendant for \$25,000, as also from Mrs. P. for the same amount, which they agreed to give. The defendant's mortgage was dated 8th October, reciting that the firm were indebted to the bank in a sum exceeding \$25,000 for moneys theretofore lent and advanced by the bank to them on promissory notes made by B. and endorsed by the firm, and by defendant and Mrs. P., and that defendant had agreed to give the mortgage as a collateral security for said sum of \$25,000, part of said indebtedness, whether represented by the notes then discounted or by renewals or substitutions therefor, and similarly made and endorsed. There was a covenant by the defendant that he or B., or the firm or Mrs. P., would pay, &c., all the said indebtedness represented by said notes when due, or by any renewals or substituted notes.

To prevent the bank noticing the difference in the signatures, B. signed the defendant's name to the mortgage, which defendant afterwards acknowledged to be his signature. At the same time, a mortgage for a like sum from Mrs. P. was drawn up, B. likewise signing her name, and she acknowledging it to be her signature. After the mortgage was executed, the notes were from time to time renewed, down to the firm's insolvency, in 1877, by notes similarly endorsed—namely, by B. writing defendant's and Mrs. P.'s names as endorsers, with, as he stated, their consent, which defendant denied. The defendant stated that when the mortgage was executed he believed, and was so told by B., that the indebtedness was only \$60,000, but evidence was given to shew that defendant knew, or must be presumed to know, that it was the larger sum. The plaintiffs sued defendant in the first seven counts of the declaration as endorser of their notes, and in the eighth count on the covenant in the mortgage. After action commenced the bank realized on B.'s mortgage \$35,000, and received from the firm's estate \$6,300. The jury found for the defendant on the first seven counts, but for the plaintiffs on the eighth.

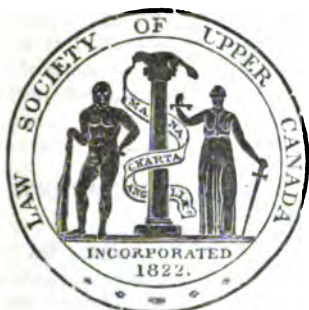
The Court refused to interfere with the plaintiffs' verdict on the eighth count, holding that there was no evidence of payment thereunto; that the defendant knew, or must be presumed to know, that when the mortgage was paid there was still an existing indebtedness of \$50,000 to which the covenant would apply; that defendant's and Mrs. P.'s mortgages were for the several sums of \$25,000 each, and not joint securities for that amount. The Court granted the plaintiffs a new trial on the first seven counts, with a direction to be given to the jury that the bank, under the circumstances, might be warranted in accepting paper similarly endorsed, &c., but if the new trial was accepted the whole case was to be reopened.

There was a similar action against defendant as executor of Mrs. P., who had since died, and a like verdict. The Court, on the same grounds as above, sustained verdict on the 8th count, but held that there could be no liability on the other counts, for he could not be assumed as executor to have authorized the use of his name as executor so as to bind Mrs. P.'s estate.

*M. C. Cameron*, Q. C., and *Robinson*, Q. C., for the plaintiffs.

*Richards*, Q. C., and *Bethune*, Q. C., for the defendant.

LAW SOCIETY, HILARY TERM.



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 41st VICTORIA.

During this Term, the following gentlemen are called to the Bar, viz:—

GEORGE FERGOUSON SHEPLEY.  
WILLIAM JAMES CLARKE.  
WILLIAM EGERTON HODGINS.  
JAY KETCHUM.  
ROBERT SHAW.  
HAMILTON PARKE O'CONNOR.  
WILLIAM CAVEN MOSCRIP.  
JAMES JOSEPH ROBERTSON.

The following gentlemen were called to the Bar under 39 Vict. chap. 31:—

DANIEL O'CONNOR.  
JOSEPH BAWDEN.

The following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:—

*Graduates.*

ALEXANDER DAWSON, B.A.  
THOMAS DICKIE CUMBERLAND, B.A.,  
WILLIAM BANFIELD CARROLL, B.A.

*Matriculants.*

FRANCIS BADGLEY WILLIAM MOLSON GILBERT LILLY.

JOSEPH MARTIN.  
J. A. C. REYNOLDS.

*Junior Class.*

HUGH ARCHIBALD MACLEAN.  
WILLIAM BURGESS.  
LOUIS F. HEYD.  
JAMES FOSTER CANNIFF.  
JOHN DOUGLAS GANSBY.  
GEORGE CORRY.  
EDMUND WALLACE NUGENT.

CHARLES PATRICK WILSON.  
DAVID MCARDLE.  
THOMAS HISLOP.  
WILLIAM ALEX. MCLEAN.  
ALEXANDER JOSEPH WILLIAMS.  
JAMES JOSEPH PANTON.  
WILLIAM MELVILLE SHOEBOOTHAM.  
JAMES GAMBLE WALLACE.  
GEORGE MOREHEAD.  
WILLIAM GEORGE SHAW.  
ROBERT PATTERSON.  
HARRY HYNDMAN ROBERTSON.  
JAMES ALEX. SHETTLE.  
MOSES MCFADDEN.  
ARTHUR B. FORD.  
GEORGE HIRAM CAPRON BROOKE.

*Articled Clerk.*

HENRY WHITE.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon, Anabasis, B. I.; Homer, Iliad, B. I.; Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Aeneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## LAW SOCIETY, HILARY TERM.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. Museums, Stumme Liebe. Schiller, Lied von der Glocke.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300; or,

Virgil, Æneid, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and

Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

*1st Year.*—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

*3rd Year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

*4th Year.*—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

N.B.—After Easter Term, 1878, Best on Evidence will be substituted for Taylor on Evidence; Smith on Contracts, for Leake on Contracts.



CONTENTS.

PART II.

NOTES OF CASES :

Court of Appeal..... 117

Queen's Bench..... 118

Common Pleas..... 121

CANADA REPORTS :

ONTARIO :

COMMON LAW CHAMBERS.

Provincial Insur. Co. v. Gooderham.

Security for costs—Bankruptcy of plaintiff

company after action—Receiver..... 121

CHANCERY CHAMBERS.

Finnegan v. Keenan.

Dismissal for want of prosecution..... 128

ENGLISH REPORTS :

Digest of the English Law Reports for February,

March, and April, 1877..... 124

LAW STUDENTS' DEPARTMENT :

Questions, Hilary Term Examinations..... 128

Osgoode Debating Society..... 130

CORRESPONDENCE :

Fusion of Law and Equity..... 131

REVIEWS..... 136

# Canada Law Journal.

Toronto, April, 1878.

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

From Q.B.] [March 20.

LEPROHON V. OTTAWA.

The Legislature of Ontario has no power to  
impose a tax upon the income of an officer of  
the Dominion Government, or to confer such  
power on the several municipalities.

Robinson, Q.C., for the appellant.  
Cameron, Q.C., and Bethune, Q.C., contra.  
Appeal allowed.

From C. C. Wellington.] [March 23.

ROGERS V. HAGARD.

Malicious prosecution.

In laying an information against the plain-  
tiff, the defendant only intended to charge him  
with having unlawfully carried away a saw,  
and stated facts to the magistrate which mere-  
ly amounted to a charge of trespass, but in  
drawing the information, the magistrate, of his  
own accord, used the word "feloniously,"

which word the defendant did not know the  
meaning of.

Held, reversing the decision of the County  
Court, that under these circumstances an ac-  
tion for malicious prosecution would not lie.

S. Richards, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondent.

Appeal allowed.

From C. C. Grey.]

[March 23.

MAY V. MIDDLETON.

Inland Revenue Act—Conviction under.

Section 165 of the Inland Revenue Act pre-  
scribes that the pecuniary penalty or forfeiture  
incurred for any offence against the provisions  
of the Act, may be sued for and recovered be-  
fore any two Justices of the Peace, . . .  
and if any such penalty be not forthwith paid  
. . . the said Justices may, in their discre-  
tion, commit the offender to the Common Gaol  
until the penalty shall be paid.

The plaintiff was tried under the Inland Re-  
venue Act for distilling spirits without having  
a license, and was ordered to pay the sum of  
\$200.

Held, affirming the judgment of the County  
Court, that the adjudication was a conviction,  
and not merely an order for the payment of  
money.

Robinson, Q.C., for the appellant.

Lane, for the respondent.

Appeal dismissed.

From C. C. Simcoe.]

[March 23.

LANGFORD V. KIRKPATRICK ET AL.

Distress for Taxes.

A notice of action to a collector for an illegal  
distress, gave the time as "on or about the  
28th May;" and the place was described as  
"at or near the west half of lot 31." The jury  
found that the seizure took place on the 23rd  
May, but the evidence shewed that it was  
merely a technical seizure, and the cause of  
action was the seizure on the 28th May, when  
the plaintiff's cattle were seized and removed  
for sale. The jury also found that the trespass  
was committed on the east half of lot 32.

Held, that the notice was sufficient, as  
reasonable certainty only is required.

The distress was levied for taxes—which in-  
cluded arrears that had been paid—and was  
made after the roll had been returned, without  
any resolution authorizing the defendant to  
collect the taxes, under Rev. Stat. c. 180, sec.  
102.

## C. of A.]

## NOTES OF CASES.

## [Q.]

*Held*, reversing the judgment of the County Court, that the distress was illegal.

*Held*, also, that there was no presumption that the defendant had received lawful authority, because it was conceded that he acted as Collector in levying the taxes.

*McCarthy*, Q.C., for the appellant.

*Bethune*, Q.C., for the respondent.

*Appeal allowed.*

From Chy.]

[March 30.]

CRAIG V. CRAIG.

*Easement—Specific performance.*

An agreement to grant an easement will not necessarily be for an easement in perpetuity.

Specific performance of an agreement to grant an easement may be enforced in equity.

A verbal agreement was entered into between the owners of two adjoining half-lots, that each should give a strip of equal width from his land, for a lane from the public highway to the clearing which they should make upon their respective lots—the agreement not being expressly limited as to time. In accordance with the agreement a rail fence was built by each on their respective sides of the lane, which they used in common for fifteen years, until the death of one of the parties. Upon a bill filed to restrain the defendant from closing up the portion of the lane situate on his land, it was proved that the greatest part of the lane was on the defendant's land: that there had been no expenditure on the plaintiff's land, or on the lane upon the faith of this agreement: and that the lane was merely kept open by mutual agreement.

*Held*, that specific performance could not be enforced as the site of the fence and user of the included land could not be referable to the original agreement; but even if the lane had been composed of equal portions of the land of each proprietor, under the circumstances no agreement to keep it open in perpetuity could be presumed.

*Ferguson*, Q.C., (with him *Bain*) for the appellant.

*Boyd*, Q.C., for the respondent.

*Appeal allowed.*

From Chy.]

[March 30.]

BOTHAM V. KEEFER.

*Jurisdiction—Partnership.*

The plaintiff, as assignee of the firm of S. J. & Co., which had been placed in insolvency

under a writ of attachment against S. J. & Co. filed a bill against the defendant, seeking to have him declared a partner of S. J. & Co. and to vest his property in the plaintiff assignee of the firm. A decree was made accordingly. The objection was taken to the jurisdiction of the Court of Chancery to make such a decree for the first time in the reasons assigned for the appeal.

*Held*, that the Court of Chancery had jurisdiction to declare the defendant a partner; upon proof of the partnership the plaintiff would have been entitled to have the partnership accounts taken; but that Court had no power to vest the defendant's property in the plaintiff.

Where there has been a contribution of capital as well as participation in the profits accruing from that capital, a partnership will be inferred, even though the parties agree that they will not call themselves partners, or do not intend to constitute that relationship.

*M. O. Cameron*, Q.C., with him *R. Hoskins* for the appellant.

*C. Moss* for the respondent.

*Appeal dismissed.*

## QUEEN'S BENCH.

IN BANCO—HILARY TERM.

MARCH 15.

REGINA V. PRETTIE.

*Conviction—Conflict of Jurisdiction of Dominion and Local Legislatures—Liquor, sale of.*

The defendant was convicted in a municipal court under the Temperance Act of 1864 where the Act was in force. The information stated that defendant did "keep and have fermented liquors for sale, the purpose of selling, bartering, or trading therein without the licence therefor by law required." The conviction was for that the defendant "did unlawfully keep liquor for the purpose of sale, barter, and traffic therein without the licence therefor by law required."

*Held*, that it was a conviction under 37 Vic., ch. 32, sec. 25 O., and was improper inasmuch that the conviction should have been under the Temperance Act of 1864, sec. 12, for keeping liquor at all, and not for keeping it "without the licence therefor by law required."

The conflict of jurisdiction between the Dominion and Local Legislatures under the power

B.]

NOTES OF CASES.

[Q. B.

regulate trade and commerce on the one  
and the right to impose police regulations  
the other, considered and discussed.

*Robinson, Q.C., and H. J. Scott for appli-  
cant.*  
*K. Kerr, Q. C., contra.*

GUNN V. NORTH.

*Equitable assignment—Contract.*

A, of whom plaintiff is assignee in insol-  
vency, contracted with T. and B. to do certain  
work, bought iron, cast iron, and galvanized iron  
work, and sublet the different kinds of work  
to different people; amongst it some to defend-  
ants for \$982. The work to be performed by  
defendants under the terms and conditions en-  
ded into between A. and T. and B., and de-  
fendants to be paid the \$982 under the terms,  
at the times, &c., expressed in the con-  
tract.

*Held*, a good equitable assignment as to the

*Behune, Q. C., for plaintiff.*  
*R. Martin, Q. C., contra.*

GORDON V. ADAMS.

*Counsel fees, assignment of—Implied contract.*

H. assigned to the plaintiff a claim against  
defendant for counsel fees. Defendant is an  
attorney, and took H., a barrister and attor-  
ney, into his employ at a weekly wage. No-  
thing was said in the contract or during the  
engagement, which lasted some years, as to  
his right to claim counsel fees.

*Held*, that no implied promise could be pre-  
sumed to pay these counsel fees, and at all  
times none that they should be paid by the  
attorney.

*Beatty, Q. C., for plaintiff.*  
*J. K. Kerr, Q. C., contra.*

BURNS V. CITY OF TORONTO.

*Negligence—Ice on side-walk—Contributory  
negligence.*

The plaintiff, while walking on Sherbourne  
street, a street centrally situated in Toronto,  
fell on some ice on the side-walk and injured  
herself, for which she sues the city. It ap-  
peared from the weight of evidence that the ice  
remained at the place of the accident all  
the winter; that the ice was caused by the  
law of the premises adjoining, which were  
higher than the side-walk; that the City Com-

missioner, whose duty it was to look after the  
state of the roads, had passed up and down the  
street in question repeatedly; that the plain-  
tiff knew the street well, and passed up and  
down it a couple of times a day, that she had  
passed it once before the same day; that she  
knew it to be dangerous, and might have gone  
another way.

*Held*, that she could not recover.

*Per HARRISON, C.J.*—Because she was guilty  
of contributory negligence.

*Per WILSON and ARMOUR, JJ.*—There was  
not sufficient evidence to shew that the city  
was aware the road was out of repair. The fact  
that the Commissioner passed the place was  
not sufficient. *Kingland v. City of Toronto*,  
23 C.P. 99, not assented to.

*J. K. Kerr, Q. C., for plaintiff.*

*McWilliams for the Corporation.*

STEVENS V. BUCK.

*Ejectment—Improvements—Equitable defence after  
argument in term—Amendment.*

Plaintiff brought ejectment for a piece of land  
as part of lot 3, which he held under a patent  
from the Crown, and the defendant claimed to  
hold it under a subsequent patent as part of lot  
4. The Court were of opinion, on the evidence,  
that the land in dispute was part of lot 3, but  
refused to find for plaintiff, as the defendant  
had been in possession for many years before  
plaintiff's patent issued, and plaintiff never  
made any claim till this action, and refused to  
pay for the improvements. There was no  
equitable defence filed by defendant, but the  
Court directed the defendant to amend by  
filing one *nunc pro tunc*, and to join issue for  
the plaintiff, and directed that on this being  
done a verdict should be entered for the de-  
fendant.

*J. K. Kerr, Q. C., for plaintiff.*

*M. C. Cameron, Q. C., contra.*

DENNY V. MONTREAL TELEGRAPH COMPANY.

*Negligence—Contributory negligence—Finding of  
Judge without a jury, as to.*

Action by widow and executrix for damages  
for the death of her husband, caused, as alleged,  
through the negligence of the defendants.

It appeared from the evidence that the de-  
ceased was attending the Brockville Assizes  
as a suitor, when it became necessary to tele-  
graph for witnesses. He went to defendants' office  
for this purpose. The day was bright,



## Q. B.]

## NOTES OF CASES.

## [Q. B.]

and snow was on the ground. The office in the part used by the public was only a few feet wide, and a few feet beyond the part of the counter where telegrams were handed in there was an open trap door. The deceased entered the office and tapped at the glass partition on the counter for the operator, who replied to the effect that he would come in a minute. The deceased stepped toward the trap-door apparently as if going round the counter, when he fell through the trap-door and injured himself so that death soon resulted. The learned judge, who tried the case without a jury, and who viewed the scene of the accident, was of opinion that deceased, if he had used ordinary care, could have seen the trap, and that he was guilty of contributory negligence, and he found for defendants.

*Held* by this Court, that there must be a new trial, for, notwithstanding the finding of the learned judge, there was in their opinion no evidence of contributory negligence on deceased's part.

*S. Richards, Q.C., for plaintiff.*

*C. Robinson, Q.C., for defendants.*

#### RE BROWNING V. CORPORATION OF TOWN OF DUNDAS.

*Assessment—Omission of name from voters' list—Application to restore—Laches—Mandamus—Costs.*

The applicant was duly assessed in the Town of Dundas for \$600 income in 1877, and his name appeared on the assessment roll accordingly. The Court of Revision, without notice to him, struck his name out, and his name did not appear in the voters' list which were posted up in August, 1877. Not examining the lists so posted up, he did not discover the omission till October, when he applied promptly to the Clerk of the Town and then to the Judge of the County Court, by summons, to have his name restored. The Judge, after examining the clerk, &c., refused to direct the amendment asked.

A rule *nisi* for a *mandamus* against the County Judge and Town Clerk to restore the name was discharged, the applicant having been too late in his application to the County Judge, and cause having been shewn for the County Judge, the rule was discharged with costs as to him.

*Browning, in person.*

*Walker, for the County Judge.*

#### WHITE V. MCKAY.

*Ejectment—Amendment by adding party plaintiff—New trial on affidavits.*

In an action of ejectment, where the defendant offered no evidence, a verdict was entered for the plaintiff, with leave to defendant to move on any ground he thought fit. Defendant having taken out a rule to set aside the verdict, on the ground that the plaintiff had not proved his title, and on affidavits disclosing new evidence which tended to show plaintiff was only entitled to a moiety, the plaintiff asked leave to amend, by adding a party plaintiff who was a bare trustee for the original plaintiff, the new party consenting to the amendment.

The Court directed the amendment to be made under sec. 222 of the C. L. P. Act, and secs. 8 and 50 of the A. J. Act of 1873, and discharged the rule on the affidavits, thinking them insufficient to establish the ground they raised.

*Kingsmill for plaintiff.*

*Oster for defendant.*

#### DRIFILL V. McFALL.

*Verdict reduced to nominal damages—Application for certificate for full costs—Trove.*

This cause is reported in 41 U. C. R. 313. There the Court ordered a verdict to be entered for \$1,000, but directed that the verdict should be reduced to nominal damages if a note in respect of which the trover was brought were given up. On this being done, a verdict was ordered to be entered, but no application up to the time the rule issued was made for the certificate. In this Term, a rule having been taken out for full costs, the Court intimated that the application, in strictness, should have been made earlier, but as there was no rule or practice, or decision in point, the Court granted the certificate.

*Per WILSON, J.*—When the Court gives the verdict, the whole proceedings—the verdict at the trial, the motion to the Court, and the verdict given by the Court—should all be entered of record.

*McCarthy, Q.C., for plaintiff.*

*Oster, contra.*

#### CURRIE V. HODGINS.

*Principal and surety—Release by giving time.*

The plaintiff became the holder of a note not due, made by defendant H. and endorsed by

endant D., dated 7th Nov., 1876, payable  
r months after date. Defendant D. pleaded  
utably, that the note was given for the ac-  
ommodation of H. to plaintiff's knowledge,  
that plaintiff gave H. time. It appeared  
n the evidence that on February 3rd, be-  
the maturity of the note, and without B.'s  
nowledge, but as plaintiff and H. swore, with-  
any reference to the note, plaintiff accepted  
n H. a chattel mortgage for a year for the  
ount of the note and other items of account  
ween plaintiff and H., payable at 10 per  
t. interest.

*Held*, following *Wyke v. Rogers*, 1 De G.  
N. & G. 408, and *Booter v. Mayor*, 19  
B. N. S. 76, that the new security was col-  
lateral to the old, and that the surety was not  
charged.

*J. K. Kerr*, Q. C., for plaintiff.  
*Beatty*, Q. C., for defendant.

[March 15.]

KIDD V. O'CONNOR.

*Set-aside arrest—Review of Judge's  
finding—Delay in moving—Amendment.*

*Held*, that the Court have power to review  
decision of a Judge granting a *ca. sa.* in a  
se pending, upon facts and circumstances  
closed on affidavit sufficient to satisfy the  
ge as to the defendants being about to  
ve the province, &c., for having made a  
ret disposal of his property, &c.

The application as first made was in time,  
was only for the discharge of defendant  
affidavits. This was sent by the Court to  
ngle judge. There it was discovered that  
rule was inapplicable to a prisoner in cus-  
y under final process, and the rule was  
ended long after the term in which the ap-  
tation was first made, so as to come to the  
rt by way of appeal. *Held*, that the  
endment was too late.

*J. Richards*, Q. C., for plaintiff.  
*Osler*, for defendant.

SHULTZ V. REDDICK.

*Distress—Notice of, too late—Damages.*

The provision of the Statutes as to five days  
ice of distress by a landlord is imperative;  
ere therefore a notice of distress was given  
the 8th February, and the sale took place  
the 12th February, it was held that the  
e was illegal.

The jury in assessing the damages for the  
plaintiff gave a verdict for the full value of  
the goods sold, less the rent due.

*Held*, that the assessment was made on a  
correct principle.

*Dunbar* for plaintiff.  
*Osler* for defendant.

COMMON PLEAS.

VACATION COURT.

MARCH 12.

HALCROW V. KELLY.

*Promissory Note—Alteration—Discharge of  
endorser.*

A printed form of promissory note with all  
the blanks filled, and complete in every re-  
spect, except that it had not been signed by  
the intended makers, was handed by them to  
defendant, endorsed by him for their accom-  
modation, and handed back to them, when  
they, without defendant's knowledge, added,  
after the words "value received," the words,  
"with interest at ten per cent. per annum,"  
and then signed it and transferred it for value  
to the plaintiff.

*Held*, that defendant was discharged by the  
alteration.

*Alexander Dunbar* for the plaintiff.  
*J. K. Kerr*, Q. C., for the defendant.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal*, by N. D. BROW,  
Student-at-Law.)

PROVINCIAL INSURANCE COMPANY V. GOODER-  
HAM.

*Security for costs—Bankruptcy of plaintiff company  
after action—Receiver continuing suit.*

Where an incorporated company, after they had com-  
menced an action at law, became bankrupt, and a re-  
ceiver was appointed by the Court of Chancery, in a suit  
in that court, and authorized to proceed in the action at

C. L. Cham.]

PROVINCIAL INS. CO. V. GOODERHAM.

[C. L. Cham.]

law. Held, that neither the company nor the receiver should be ordered to give security for costs.

[January 11—Mr. DALTON.]

This was an action for calls, during the pendency of which the plaintiffs became bankrupt and a receiver was appointed by the Court of Chancery, at the instance of a creditor, to wind up the affairs of the company, and, before this application, had been authorized by that Court to proceed with this action.

*Biggar* obtained a summons to shew cause why the plaintiffs or the receiver should not give security for costs, on the grounds (1) that the plaintiffs had become insolvent since the commencement of the action; and (2) that the receiver, a solvent person, was suing in the name of an insolvent plaintiff.

*Biggar* moved the summons absolute. *Malcolm v. Hodgkinson*, L. R. 8 Q. B. 209, is precisely in point. There a receiver had been appointed, as in this case, and was suing for the benefit of the estate, and he was ordered to give security for costs. There is a distinction, with regard to ordering security, between cases in which, after the action has been commenced, the plaintiff becomes insolvent, and those in which he is insolvent at the commencement of the action. In the former case the assignees, if they interfere, will be ordered to give security: *Mason v. Polhill*, 2 Dowl. 61; *Stead v. Williams*, 5 C. B. 528, 530, 531 (a); *Heaford v. Knight*, 2 B. & C. 579; *Denton v. Williams*, 8 Dowl. 123. The case of the *United Ports and General Ins. Co. v. Hill*, L. R. 5 Q. B. 395, will be cited for the plaintiffs, but it is an earlier decision than *Malcolm v. Hodgkinson*, and seems to be overruled by it. The mischief intended to be avoided clearly is the allowing of a solvent person to prosecute, in the name of a bankrupt, a suit which the nominal plaintiff, from his very bankruptcy, could not carry on.

*Lyon* shewed cause. In *Sykes v. Sykes*, L. R. 4 C. P. 645, Bovill, C. J., says, at page 647: "To entitle a defendant to security, he must shew that not only plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. . . . That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt. The distinction is manifest; for, though there may be legatees or creditors, it does not follow that they will receive their legacies or a dividend on their debts; and so there is no per-

son interested to give, or who would be willing to give, security for costs." And so he continues, maintaining this proposition; and this decision was concurred in and followed in *Denton v. Ashton*, L. R. 4 Q. B. 590, where it was held that an assignee suing for the benefit of the creditors will not be ordered to give security for costs. The *United Ports, &c., v. Hill*, L. R. 5 Q. B. 395, is to the same effect. Moreover, the Court of Chancery having appointed a receiver and authorized him to proceed with the action, any application which would interfere with his proceeding should be made to that Court. If security be ordered here, it will in effect stay all further proceedings in this action, and as there are a number of cases in the same position, such an order would result in altogether preventing the collection of the assets of the company. [Mr. DALTON referred to *Campbell v. Lepan*, 19 C. P. 34, per Gwynne, J., and *M'Culloch v. Robinson*, 2 Bos. & P. N. R. 352.]

Mr. DALTON.—On the argument of the summons, Mr. Lyon resisted the application upon two grounds—(1) that a receiver having been appointed by the Court of Chancery, the application should have been made to that Court, and not here; (2) that in any event the defendant was not entitled to the order, and I think the authorities support both these contentions.

As to the first—In *Oliva v. Johnson*, 5 B. & Ald. 908, counsel for plaintiff says, *arguendo*: "Besides, it is a decisive answer to the present application, that this is an action brought in pursuance of liberty granted by the Vice-Chancellor, upon the hearing of a petition in bankruptcy, for the purpose of trying the validity of the commission." Counsel *contra* observed that this was an action brought, not by the direction of the Vice-Chancellor, but merely in pursuance of liberty reserved. The Court, in giving judgment, say: "The case of an action brought by the direction of the Vice-Chancellor differs widely from that of an action brought merely in pursuance of leave or liberty reserved. If this had been a case of the former kind it would have been distinctly within the authority of *M'Culloch v. Robinson*, but as it is the plaintiff may apply to the Vice-Chancellor for his directions as to security for costs being or not being required: we cannot take this case out of the general rule." The plaintiff's course in the present case was to have applied to the Court of Chancery in the suit pending there, and he may do so now if so advised.

As to the second point—In giving judgment in the *United Ports, &c., v. Hill*, L. R. 5 Q. B. 395, Cockburn, C. J., says, at page 396: "The defendants ask us to apply the principle—that where an insolvent party is put forward as a plaintiff by a solvent person, the plaintiff shall give security for the defendant's costs—to the present case, where insolvent plaintiffs are themselves suing in their own names and for their own debt. It is true it is under the directions of the official liquidator, but that can make no difference; and it is clear that if the company were not being wound up, and were suing of their accord, and not under the directions of the liquidator, they could not be compelled to give security for costs;" and Mellor, J., says, at page 397: "The defendants are in no worse position than any other defendant who is sued by an insolvent plaintiff, unable to meet costs if unsuccessful." This is exactly the present case, and is, I think, a clear and correct exposition of the law, and is entirely consonant with good sense.

I therefore discharge the summons on both grounds, but as the case of *Malcolm v. Hodgkinson* is not consistent with this view, I think the defendant was justified in making the application, and so I discharge it without costs to either party.

*Order accordingly.*

## CHANCERY CHAMBERS.

(Reported for the *Law Journal* by N. D. BACK, Student-at-Law.)

### FINNEGAN V. KEENAN.

*Dismissal for want of prosecution—Filing replication—Undertaking to speed the cause—English Practice*  
*Lis pendens—Statute of Limitations—Mistake of Solicitor.*

*Held*, confirming the judgment of the Referee:

1. That filing a replication after service of notice of motion to dismiss cannot be taken into consideration on the motion.

2. That though the delay be occasioned by the mistake of the solicitor, *per se* that will not warrant the Court in refusing the motion on an undertaking to proceed.

3. Nor will the mere fact that, if the bill be dismissed, the plaintiff's claim will be barred by the Statutes of Limitations.

[*REFFEREE*, Jan. 9, BLAKE, V.C.—Jan. 28.

This was an appeal from the judgment of the Referee dismissing the bill for want of prosecution.

The following dates are material:—

30th June, 1876.—Bill filed—*Lis pendens* issued and registered.

9th Sept., 1876.—Bill served.

23rd Jan., 1877.—Answer filed.

29th Jan., 1877.—Defendant's affidavit on production filed.

31st Jan., 1877.—Demand of copy of affidavit on production served.

5th March, 1877.—Copy served.

20th March, 1877.—Spring sittings at Lindsay.

18th Sept., 1877.—Autumn sittings at Lindsay.

15th Dec., 1877.—Notice of present motion served.

20th Dec., 1877.—Replication filed.

The other material facts will appear from the arguments.

*Appeal* for the appeal. Filing of the replication subsequent to the service of the notice of motion is an answer to the motion to dismiss: *Hughes v. Lewis*, 8 W. R. 292. The defendants have been guilty of great delay, and cannot take advantage of the delay of the plaintiff, who, accounts for his delay. As to the spring sittings—the defendant's answer was not filed until the 23rd of January, although the time for filing it expired on the 7th of October; and, although a demand for a copy of the defendant's affidavit on production was served on the 31st of January, it was not complied with until the 5th of March, fifteen days before the sittings, which made it impossible to have the case set down at Lindsay; and, moreover, the plaintiff was entitled to examine the defendant on his affidavit before going to a hearing. The non-compliance with the demand operated as a stay of proceedings. *Proudfoot v. Thompson*, 1 Ch. Cham. 367. As to the autumn sittings—the plaintiff's solicitors, in reply to a letter from defendant's solicitor, a short time before these sittings, wrote him, saying that they intended to set the case down, and they did send instructions to their agents at Lindsay to do so, and it was through some mistake of the agents that it was not done; yet, after this was discovered, the defendant's solicitor refused to consent to take short notice of hearing; this conduct on their part was unreasonable. The Court will not dismiss the bill where the delay has been occasioned by the mistake of the solicitor: *S. I. of W. & P. I. S. Co. v. Rawlins*, 13 W

Chy. Cham.]

FINNEGAN v. KEENAN—DIGEST OF ENGLISH LAW REPORTS.

[Eng. Rep.]

R. 512; *Devlin v. Devlin*, 3 Ch. Cham. 491. If the bill be dismissed, the plaintiff's claims will be barred by the Statutes of Limitation, which the Court will not allow in a case like the present: *Dunn v. McLean*, 6 P. R. 156.

*H. Cassells contra.* Filing the replication is no answer to the motion: *Spawn v. Nelles*, 1 Chy. Ch. 270. Nor is the mere fact that the delay arose through the solicitor's mistake: *Winnett v. Renwick*, 6 P. R. 233. The defendant delayed filing his answer, while the plaintiff was endeavouring to get him to settle the suit, and as soon as these negotiations were at an end the answer was filed. The plaintiff's solicitors, if they had been anxious to proceed without delay, could have obtained a copy of the affidavit on production from the Clerk of Records and Writs. The real reason why the case was not set down for the spring sittings was the illness of one of plaintiff's solicitors.

Blake, V.-C.—A *lis pendens* has been registered in this suit. I have always understood that, where a party to suit obtains an injunction, he must proceed with the greatest possible expedition, and, a *lis pendens* being in effect an injunction, the same rule applies to the present case. Now, there has been great delay here on the plaintiff's part, and it has not been satisfactorily accounted for. Mr. Applebe contends, that the filing of the replication, pending the motion to dismiss, was an answer to the motion, and he cites several English cases in support of this contention; but these cases are not applicable; an entirely different practice prevails here. In England, the practice was to refuse a motion to dismiss for want of prosecution, upon the plaintiff undertaking to speed the cause or upon his actually proceeding; but, for the last ten or twelve years, in our Courts that practice has not been followed, our orders then altered the practice, and laid down a more strict rule than was theretofore in force here or in England. (See Con. Gen. Orders 276.) The plaintiff must account for his delay or the bill will be dismissed. Then, it is urged that this is done by showing that the delay occurred through the mistake of the solicitors or their agents, but this alone, as a general rule, is not sufficient; it is but an element for the consideration of the Court; something more must ordinarily be shewn before the Court will relax its rules; a plaintiff must, besides shewing this, either account for the delay, though perhaps not so clearly as where this element does not exist, or he must shew that

he will suffer an irremediable injury of a serious nature, which is not shewn here, for the plaintiff has his remedy against the solicitor. Again, it is urged that the Court will not dismiss a plaintiff's bill, if his remedy is thereby barred by the Statute of Limitations; but, although in some cases where the delay has been to some extent explained, the circumstance of the not allowing the indulgence resulting in the loss of the claim by the Statute of Limitations intervening, is taken into consideration, yet in other cases, as in *Mulholland v. Brent*, 2 Ch. Chan. 31. it is said the want of diligence by the plaintiff has resulted in the defendant's being entitled to a dismissal of the bill, and, although this works a bar of the plaintiff's claim, we shall not take from the defendant the double benefit he has procured through the laches of his opponent—the fact, that the non-prosecution of the suit with reasonable diligence might have resulted in the ultimate loss of the claim by the intervention of the Statute of Limitations, should have spurred the plaintiff on to greater diligence. I think this is a case in which the rule as laid down in *Mulholland v. Brent* should be followed, and dismiss the appeal with costs.

*Appeal dismissed with costs.*

## ENGLISH REPORTS.

DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH AND APRIL, 1877.

(Continued from page 91.)

### NEGLECT.

1. A railway train stopped at a station in such a way that the engine and part of the first car stood beyond the platform. A female passenger who wished to get down waited some time on the car-step for assistance, but finally, fearing the train would start, tried to alight alone. She had her hands encumbered with parcels, and fell and injured herself. On these facts, *held*, that there was sufficient evidence of negligence on the part of the railway company to go to the jury.—*Robson v. The North-Eastern Railway Co.*, 2 Q. B. D. 85.

2. A train on defendant's railway, on which plaintiff was a third-class passenger, ran by at a station, so that the car on which the plaintiff was, shot beyond the platform. Defendant's servants called out to the passengers to keep their seats, but plaintiff and others in the same car did not hear them. After a while, on the advice of a friend, and

## DIGEST OF ENGLISH LAW REPORTS.

seeing passengers from other cars descending, plaintiff, with some one's help, descended. In so doing she was injured. *Held*, that there was evidence of negligence on the part of the defendants to go to the jury.—*Rose v. The North-Eastern Railway Co.*, 2 Ex. D. 248.

See COLLISION, 1.

## NEGOTIABLE INSTRUMENT.

Plaintiff placed certain scrip certificates in the hands of a broker, for the purpose of having the instalments paid on them according to their tenor, and finally of converting them into stock. A usage was proved that among bankers and brokers such certificates were transferable by mere delivery. The broker made them over to the defendant for a debt of his own, and the defendant received them in good faith as his property. *Held*, that the defendant was entitled to them as against the plaintiff, the latter being estopped to deny that the certificates were transferable by delivery.—*Rumball v. The Metropolitan Bank*, 2 Q. B. D. 194.

NOTICE.—See PRINCIPAL AND AGENT, 1.

PASSENGER.—See COMMON CARRIER.

## PETITION OF RIGHT.

A sum of \$3,000,000 was received by the British government from China on account of debts due British merchants from bankrupt Chinese merchants. *Held*, that a petition of right by a claimant of a portion of this sum would not lie, and that by virtue of a treaty with a foreign power the crown can never be a trustee or agent of a subject.—*Rustomjee v. The Queen*, 2 Q. B. D. 69; s. c. 1 Q. B. D. 487.

## PLEADING AND PRACTICE.

The court will not decide on a fictitious case, where the parties who would be affected by it are not *in esse*, and may never be, and when such decision would not be binding, and might cause trouble which would never arise unless the persons not now *in esse* should come into being.—*Bright v. Tyndall*, 4 Ch. D. 189.

See CONSPIRACY; FOREIGN JUDGMENT, JURISDICTION, 1, 2.

PLEDGE.—See MORTGAGOR AND MORTGAGEE.

POSSESSION:—See MORTGAGOR AND MORTGAGEE, 2; VENDOR AND PURCHASER, 1.

POWER OF APPOINTMENT.—See APPOINTMENT.

PREFERENCE.—See FRAUDULENT PREFERENCE, 3.

PRESUMPTION OF DEATH.—See MORTGAGOR AND MORTGAGEE, 1.

## PRINCIPAL AND AGENT.

1. A broker sold Consols which were trust property for cash, received the amount by check from the trustee who employed him, and deposited the check in his bank. At the same time, he bought with the pro-

ceeds of the Consols railway stock, which could only be transferred on the settling day, two days later. He had notice that the Consols were trust property. On settling day he failed, and there was a sum at his banker's to his credit. *Held*, that the proceeds of the Consols should be traced and claimed as being trust property, and that the trustees thereof need not come in merely as a general creditor.—*Ex parte Cooke. In re Strachan*, 4 Ch. D. 123.

2. Plaintiff offered to sell his colliery for £25,000 net. Defendant thought he could sell it for him, and after some correspondence plaintiff wrote defendant that if the latter could sell his colliery for £30,000, defendant might retain the extra £5,000. Defendant, on enquiries, thought the colliery could be sold for more, and entered into negotiations with one C., a law student, without means, and as a result C. got a purchaser at £40,000. The transaction was carried through; the plaintiff received £25,000, believing as alleged, that the property brought only £30,000, defendant got £5,000, and C. £10,000. The evidence before the Vice-Chancellor was very voluminous and conflicting, and the Vice-Chancellor held, on his view of it, that the defendant and C. were jointly and severally liable to the plaintiff for the £10,000. On appeal, *held*, without hearing appellant's counsel, by the court (JAMES, L. J., BAGGALLAY, J. A., and LUSH, J. A.) that the transaction was perfectly legitimate, and that the plaintiff's bill must be dismissed with costs.—*Morgan v. Elford*, 4 Ch. D. 352.

## PRINCIPAL AND SURETY.

Defendant, D., contracted with plaintiffs for their surplus ammoniacal liquor. The amount was to be measured at the end of each month, and payment made within the next fourteen days, unless the plaintiffs allowed a longer time. P. and C. became D.'s sureties on this contract. He paid part of his July account, and, August 21, plaintiffs took his promissory note for the balance. He did not pay the August nor September dues. *Held*, that the sureties were discharged as to the amount for which the promissory note was taken, but not for the August and September dues. The contract was separable.—*The Croydon Commercial Gas Company v. Dickinson et al.*, 2 C. P. D. 46.

PRIVILEGE.—See LIBEL AND SLANDER, 1, 2.

PRIVITY.—See TELEGRAPH.

## PROBATE.

J. made his will, and then married. On the wedding-day he added a codicil, making provision for his wife. She died before him. On his death only the will without

## DIGEST OF ENGLISH LAW REPORTS—LAW STUDENTS' DEPARTMENT.

sums received or to be received by the company for shares, and fifty per cent upon all money by way of capital to be at any time borrowed by it, until the payments so made should amount to the said £6,000. Subsequently, 1,000 paid-up shares were assigned to A. The company never received any moneys in the ways named in the deed, and no more shares were ever sold. On winding up, *held*, that A. had no vendor's lien on the lease.—*In re Brentwood Brick & Coal Co.*, 4 Ch. D. 562.

SEE CONTRACT, 3; CONVEYANCE; PRINCIPAL AND AGENT, 2; WARRANTY.

VOLUNTEER.—SEE MARRIAGE SETTLEMENT, 1

WAGER.—SEE CONTRACT 2.

WARRANTY.

Plaintiff bought of defendant a pole for his phaeton. The pole broke short off, by the swerving of the horses in driving, and the horses were damaged. The jury found that the pole was not reasonably fit for the carriage, and that the defendant was not guilty of any negligence; and awarded as damages the value of the pole. *Held*, on appeal, that the defendant was liable on an implied warranty that the pole was fit and proper for the specific purpose for which it was sold, and that the warranty extended to latent defects, and that the injury to the horses should be taken into account in awarding damages, in case the jury should find on a second trial that such injury was a natural consequence of the defect in the pole. *Readhead v. Mid. Ry. Co.*, L. R. 4 Q. B. 379; commented on.—*Randall v. Newson*, 2 Q. B. D. 102.

SEE SPECIFIC PERFORMANCE

WAY.

M. had a right of way, for agricultural purposes, over an occupation road to his field. He agreed to sell the surface of his field, reserving the mines, which had, however never been worked. The purchaser made the road unfit to use for mining purposes. *Held*, that the court would not order the obstructions in the road removed, especially as the vendor had no present intention of working the mines.—*Bradburn v. Morris*. *Morris v. Bradburn*, 3 Ch. D. 812.

WIDOW.—SEE DOWER.

WILL.

1. A testatrix attached a codicil to her will by a pin, and had the witnesses to the latter sign their names on the back of the will itself, in attestation of the codicil. *Held*, that the will and codicil be admitted to probate together.—*In the goods of Braddock*, 1 P. D. 433.

2. B. made his will, disposing of all his property. He subsequently married, and

made a second will, in which he named the same executors, but gave the bulk of his property to his wife and children in trust. Then followed a provision, that, in case there were no children living at the death of his wife, the previous will was revived, and certain of its directions were to be carried out. The testator left a wife and child. *Held*, that the two wills should be proved together, and the first held to be incorporated in the second.—*In the goods of Bangham*, 1 P. D. 429.

SEE APPOINTMENT; BEQUEST, 1, 2; CLASS; CONTRIBUTION 1, 2; DEVISE; DISTRIBUTION; PROBATE; TRUSTEE, 1, 2.

WITNESS.—SEE LIBEL AND SLANDER.

WORDS.

"Children."—SEE APPOINTMENT.

"To do Justice." "Relations."—SEE BEQUEST, 2.

"Shipped."—SEE CONTRACT, 1.

"Cargo."—SEE CONTRACT, 4.

"Eldest Son."—SEE CONSTRUCTION, 1.

"Die without Issue."—SEE CONSTRUCTION, 2.

"In." "Traveller."—SEE INNKEEPER.

"Works, Rents, and Rates."—SEE MORTMAIN.

"Palmistry."—SEE SPIRITUALISM.

—*American Law Review.*

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

HILARY TERM, 1878.

FIRST INTERMEDIATE.

*Smith's Common Law, Con. Stats. U. C. Chaps. 42 and 44 and Amending Acts.*

1. Define the terms *Assault* and *Battery*. Under what circumstances are they justifiable?

2. What authority has a Justice of the Peace to arrest in cases of felony and other breaches of the peace?

3. When can an executory agreement, not under seal, be shown to have been subsequently verbally waived or varied?

4. In case of a breach of warranty of an article which has been paid for, what remedy has the purchaser?

5. Define the term *Barratry*.

6. If an act done is both a tort and a felony, and therefore punishable both civilly and criminally, what would require to be done before proceeding with the civil action? Explain your answer.

7. What is the effect of making a promissory note expressing in the body of it that

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

payable at a certain bank and not otherwise? Give reasons for your answer.

## SECOND INTERMEDIATE.

*Equity.*

1. What is meant by constructive notice? State.

2. Define "Reconversion."

3. At common law what interest has a husband.

(a) In the rent of his wife's lands?

(b) In the wife's personalty in her possession at the time of the marriage?

(c) In her choses in action?

(d) In her legal chattels real?

4. What is a Bill of Peace?

5. Under what circumstances will Courts of Equity set aside voidable instruments?

6. What is a Ward of Court?

7. How may an executor proceed so as to be safe in distributing the assets of the estate amongst the legatees in case it should afterwards appear that there were outstanding unsatisfied debts of the testator.

## CERTIFICATE OF FITNESS.

*Leake on Contracts.*

1. Under what circumstances can money deposited with a stake-holder upon an illegal wager be reclaimed.

2. Distinguish between the duties of the court and the jury, in regard to a question of the annexation to a written contract of incidents by the intrinsic evidence of usage and customs of trade.

3. What is the effect of a person knowingly selling a chattel with a latent defect without disclosing it to the buyer? Will express stipulation make any difference as to this.

4. An insurance office having two departments, one for insurance and one for annuities, the latter department effects a policy of insurance with the former upon the life of a person to whom a loan had been made and who had covenanted to pay the premiums for insuring his life. Could the debtor be charged with the premiums and why? What general principle of the law of contracts is illustrated in your answer.

5. State and illustrate the distinction drawn between written and unwritten contracts as to the decision of the question whether the agent or the principal is the actual party to the contract.

6. Define the terms *champerty* and *maintenance*.

7. Can a written contract be altered or discharged under any, and if so, what circumstances, by parol agreement without writing?

8. Can a deed which has been avoided by an alteration be given in evidence for any, and if so, what purpose?

9. What is meant by *estoppel by Judgment*? Give an example of it.

10. Two parties A. and B. are jointly entitled under a contract after breach A. dies. Who would then be the proper party or parties to sue? Suppose that after the death of A., B. dies, who would then be entitled to sue?

## CALL.

*Stephen on Pleading, Byles or Bills, Common Law Pleading and Practice and the Statute Law.*

1. Define *real*, *personal* and *mixed* actions. Why are the distinctions between these classes less important now than formerly?

2. Indicate the various statutory enactments which have had the effect of diminishing the frequency of pleas in abatement in our system of common law pleading.

3. Under what circumstances are judgments of *non-pros.*, *nolle prosequi*, *retraxit* and *cassetur breve* respectively obtained?

4. Explain and illustrate the rule of pleading that it is not necessary to allege circumstances necessarily implied.

5. What are the two peculiar qualities of contracts on bills and notes as distinguished from other contracts in general?

6. In how far is a *dormant* partner liable on bills drawn, accepted or endorsed by his co-partners in the name of the firm (1) when bills are negotiated for the benefit of the firm, (2) when given by one of the partners for his own private debt?

7. On what instruments are days of grace allowed? What difference is there in the law with regard to days of grace in England and in Canada?

8. If a debtor refer his creditors to a third person for payment generally and takes a bill from such person, which is afterwards dishonoured, will the original debtor be discharged under any, and if so, what circumstances?

9. Within what time must suits under the Mechanics' Lien Acts be brought? Answer fully.

10. What statutory change has been



## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS—OSGOODE LITERARY SOCIETY.

made in regard to the common law rule that husband and wife are inadmissible in evidence the one for the other? Give your answer fully, stating exceptions.

*Dart on Vendors and Purchasers—Walkem on Wills—The Statute Law.*

1. What do you understand by *scintilla juris*? What was the necessity of it? What is the present law regarding it?

2. A testator bequeaths a sum of money to A; devises lands to a religious corporation; devises other lands to C and the heirs of his body; and gives the residue of his estate to B. A and C. die during the testator's lifetime, both leaving issue. The testator leaves several children him surviving. Show the interests of the several parties in his estate, and give your reasons.

3. What is the statutory meaning of the words "die without issue," occurring in a will?

4. To whom is registration of a conveyance of land notice of the existence of such conveyance?

5. There is a contract binding A to sell and B to purchase certain lands. Before completion, B dies. Afterwards, through some act of the vendor, he forgets his right to enforce payment of the purchase money. What was formerly the position of the heir of B in respect to the contract? Has any statute modified his rights? Give the statute which applies to analogous cases.

6. In questions of title between vendor and purchaser, what is the general rule as to presumptions?

7. After a conveyance by lease and release, the vendor acquires an estate in the lands which had been outstanding. Can the purchaser require a conveyance of such estate? Explain fully.

8. In what cases does notice to a solicitor not constitute notice to the client?

9. What is necessary to constitute land the separate estate of a married woman? What power has a married woman as to conveying such estate? Explain the origin and nature of that power.

10. One of the joint owners of a parcel of land has been absent and unheard of for some years, and it is uncertain whether he is alive or dead. Can any, and if so, what proceedings be taken to obtain a partition which will bind the interest of the absent party?

**OSGOODE LITERARY AND DEBATING SOCIETY.**

16TH FEBRUARY, 1878.

After the usual Lecture on Chancery Practice by the President, the Society met this evening in the Class-Room, Osgoode Hall, at 8 o'clock. After the reading of the minutes of last meeting, Mr. T. P. Galt, the Second Vice-President, was requested to take the chair. Mr. Meyer then read a selection from Charles Dickens. "Law, Lawyers, and Law Students" were then discussed with special reference to their weaknesses by the Essayist, Mr. Dingman. The debate on a resolution to abolish Grand Juries was opened by Mr. T. E. Hodgins for the affirmative, followed on the same side by Mr. E. T. English, with Mr. Moberly and Mr. Harris for the negative. The Chairman, after summing up, decided for the affirmative. The programme for next meeting having been read, the meeting adjourned.

March 2nd, 1878.

After routine, Mr. Teetzel was elected an honorary member. Mr. Moberly read "The Picket of the Potomac," a poem founded on an incident of the American Civil War. The debate followed on the question of cumulative voting, the adoption of the system being opposed by Mr. McArdle and Mr. McHugh, and supported by Mr. Andrews and Mr. MacLise. The President gave his decision against its adoption. The Society then adjourned.

March 9th, 1878.

After routine, the following gentlemen were elected as honorary members: J. S. Fullerton, H. D. Gamble, P. C. Machie, L. A. Macpherson, and D. B. McTavish. A committee was then appointed to make and report arrangements for holding the annual dinner of the Society, immediately after the coming examinations. The programme for the evening consisting of an open debate on the subject, "Resolved that it is not desirable to change the system of exemptions in Municipal taxation." Mr. H. Morrison led off on the affirmative, and was replied to by Mr. Mills. An interesting discussion

## FUSION OF LAW AND EQUITY.

followed, many members taking part. After summing up, the President decided in favour of the negative. After announcing the programme for the following meeting, the Society adjourned.

March 16th, 1878.

This evening, after a lecture on Chancery practice by the President, the Society was called to order. After the reading of the minutes, the Society proceeded with the election of honorary members, and enrolled amongst its members these gentlemen: H. Cassels, J. S. Tupper, J. T. Small, W. E. Hodgins, H. Symons, W. Barwick, C. J. Holman, A. C. Galt, H. J. Scott, and T. G. Blackstock. A motion to conduct the Society's annual dinner on temperance principles, stood over as a notice until next meeting. The subject of debate being an interesting one, we give it at length—

In 1872, A, who had a power of appointment over certain estate, made a will containing the following clause: "I devise all my real estate to B." The will contained no reference to the power. At the date of the will, A had no real estate, save that over which he had the power of appointment, and a parcel upon which he held an overdue mortgage; and being then aware that death was approaching, he had no expectation of acquiring any. Resolved, that the land over which A had the power of appointment passed by his will.

This was debated on the affirmative by Mr. Dingman and Mr. Christie, and on the negative by Mr. Moberly and Mr. Andrews. After some able speeches in which an appalling number of authorities were cited to elucidate the point, the President decided for the affirmative. The Society then adjourned.

## CORRESPONDENCE.

*Fusion of Law and Equity.*

TO THE EDITOR OF THE LAW JOURNAL:

DEAR SIR.—It is matter for congratulation to find public opinion sufficiently alive to the importance of this subject to convince its opponents that they can no

longer trust to their tactics of twenty years ago. This discussion has not on our side any object beyond facilitating speedy and effective legislation, and the proper understanding of the question in all its bearings before it is legislated upon; we therefore welcome, as I personally do, every communication, whether from friends or foes, which is temperately written and defines the views of any section of the profession. It is however difficult for us to understand how any section of the profession or the public can really be benefited by preventing (even if they could) a final and complete settlement of what is at present all doubt, dissatisfaction and uncertainty, neither fused nor distinct, and without any certain or intelligible lines of demarcation between what is and what is not fused; especially when we are not only willing but anxious to make the fusion, in whatever shape it shall appear best, most acceptable to every section of the profession, so far as is compatible with its being a measure acceptable to the public. Our idea is simply this—that there should be no law that is not equity, no useful equity that is not law.

I think, however, I may fairly, and I hope usefully, urge upon my opponents the inutility of occupying so much of their letters as they have done with what the late Artemus Ward would style "sarkasm." For this reason I may admit (as for argument sake I do) that they are all that could be wished for in personal satire, as innocent as a lamb and as playful as a monkey, and yet successfully contend that even so, it is as much out of place in such a discussion as this, in which nothing is of any value except what tends to establish a truth or dispel a mistaken illusion, as it would be in one of the problems of Euclid.

Passing on to the consideration of whatever else those letters contain, nothing can be found in that of "Humble Stuff" beyond this, that however desirable such a measure as we advocated might be, if attainable, we should not attempt it, because no one in Canada has sufficient mind or legal attainments to properly frame such an Act; and even if such an Act could be passed, and were passed, the Chancery Judges would in-

## FUSION OF LAW AND EQUITY.

terpose their *vis inertia*, and thus render the measure, however good it might otherwise be, of no practical effect, notwithstanding the Statute, adhering to their old practice and refusing to adopt the new. That may be—and I do not dispute it—Mr. Humble Stuff's candid opinion of the Judges of his court, but in my opinion it is a very mistaken one. We all feel sure they would not attempt any such course, and if they did the measure recommended by us (see my letter in your issue of November last, pages 331 and 332) would effectually frustrate any such attempt. I have also there sufficiently disposed of his not very complimentary estimate of the legal mind of Canada to make it unnecessary here to say anything on that subject, unless he imagines that his assertion, that it took the English Legislature 118 "statutory pages" (whatever that may mean) to make the mistake described in that letter of mine, refutes all I there said in that behalf: as to this I shall merely observe that even if they had used seven thousand pages for that purpose that would not make it impossible for any one in Canada, by avoiding the now ascertained errors of the English law reformers, to accomplish, in twenty-five pages, more or less, all that those English law reformers aimed at, yet failed to accomplish. Further, to my mind that Statute comes the nearest of anything of the sort I can recollect to the ancient rhodomontade of the mountain long in labour, bringing forth at last nothing but a ridiculous mouse, for that act and its attendant rules of Court accomplish nothing, or almost nothing, beyond what Mr. Mowat's Acts and our Judges' Rules had previously done in much fewer pages of much less pretentious, but more intelligible language, as every one can satisfy himself by reading the outlines of those English Rules and Statutes in your issue of January last, pages 5 to 10. I am aware it is there stated that some person said that one of our Judges said those rules were "models of drafting." If our Judge said so I submit to his ruling; they are models of that peculiar style of drafting; but I further submit that, nevertheless, the magniloquence of that Statute and those Rules, compared

with the meagreness of what they perform, suggests the idea of erecting the most costly and perfect steam machinery, driven by the best five hundred-horse power engine, and using all of it solely to crack peas, when, if that was all that was meant to be done with it, it could have been just as satisfactorily accomplished with a little thing resembling a pepper-mill, price fifty cents, screwed to the table and turned by a child.

As to "Equity," as he objects to my assuming "that those members of the profession who are accustomed to practise in the Court of Chancery are stout opponents, not only of a proper measure for bringing about fusion, but of the very principle itself," he must be considered, not as an opponent, but as an advocate of a proper measure of fusion, and as only finding fault with what he supposes to be our proposed plan of carrying it out, and probably he would not have written as he has if he had not been ruffled by my classing him, unintentionally, amongst the opponents of that measure, merely because he happens to be one of those who practise exclusively in Chancery. It gives me much pleasure to find that I made a mistake in placing all who so practise in Chancery amongst our opponents, and to apologize for that mistake, which shall not be repeated; especially as since the publication of my letter I have discovered that others of his class are even more with us than he is, and in particular, that the head of one of the oldest and most prominent Chancery firms in Toronto, a Q.C. and something more, and who stands very nearly, if not quite, on a level with the Attorney-General himself, holds fully as advanced views on this subject as I do.

"Equity's" letter, however, does not define as clearly as could be wished the plan of fusion he advocates. So far as I can make out, it would be shortly and simply this: In his belief the Court of Chancery, including its system of pleading, practice and procedure, is, and always was, not only superior to anything of the sort elsewhere, but also pure and absolute perfection; therefore nothing there should be interfered with, but all the

FUSION OF LAW AND EQUITY.

other courts should be made similar to Courts of Chancery in every respect. That is, beyond question, intelligible, logical, and what we all should join him in obtaining, provided always (but that is the rub) that what he so assumes to be facts are so; but it is equally clear every mere common-law man who has never known and never considered any other system than his own (and there are yet a few, though not many such) can and will, if allowed to similarly assume his alleged state of facts, come to the exact opposite conclusion by the self-same mode of reasoning. It therefore becomes necessary to test the correctness of "Equity's" assumed state of facts, which I propose doing as follows: I find no fault with the essential principles of equity nor with its system of pleading, but I join issue with "Equity" in his ideal estimate of the transcendent excellence of Chancery practice, and leave it to your readers, who do not regard that practice with the eyes of the fond devoted lover, who neither has any knowledge nor any wish to acquire any knowledge of any other, to judge between us.

I take it for granted "Equity" has not practised long enough in Chancery to know, or he would in his letter have candidly admitted the fact, that originally and for a long time the Court of Chancery had no other mode of enforcing its decrees for payment of money or costs than the cumbrous, dilatory processes of sequestration and attachment, and that when the more advanced Chancery practitioners endeavoured to borrow from common-law procedure, the now familiar equitable *fi. fas.* goods and lands, &c., the innovation was so strongly and bitterly opposed that it had to be forced upon the Court of Chancery, A.D. 1859, by Stat. 22 Vict. ch. 33, which Act also introduced from the Common Law other improvements in Chancery practice and procedure; and, although that Act left it optional for all practitioners to use the old or the new processes, yet the superiority of the new ones on the common-law plan was so great that they have in all ordinary cases wholly superseded the old ones. Of still greater benefit, especially to lawyers practising outside Toronto, were those further ideas im-

ported from the Common Law into Chancery, also against their will, by Statute and Rules of Court—*i.e.*, decentralizing the proceedings in the Court of Chancery, by compelling its Judges to go circuit like the Judges of Assize, and to appoint the local masters and registrars outside Toronto, by analogy to the deputy clerks of the Crown and Pleas in the county towns; also the examination and cross-examination of witnesses *viva voce*, as at law, instead of as theretofore by affidavit and special commission in each case; besides the many other similar adaptations from common-law procedure and practice, which are well known to the older Chancery practitioners, but which I have neither time nor space at present to further particularize.

The above, however, by no means exhausts all that can be usefully done in that direction. Chancery practice and procedure is yet capable of being similarly still further simplified and improved in the following, among other, respects: We have in Chancery, motions, petitions, &c., all for practically doing the same sort of business, but which business is arbitrarily and unnecessarily cut up and separated into several branches, for each of which some one of those modes is considered the only appropriate remedy. To make matters worse, it often happens that the best minds will differ as to whether a particular case is within one or another of those branches; yet it is fatal to the application if the mode which shall be ultimately held the correct one be not the one adopted. Now, since the one by motion is almost analogous to moving at law by summons, or rule *nisi* on affidavits, and much the simplest and best of all the Chancery modes, why could not it, or a summons or rule *nisi*, be adopted in all the courts, especially after they are, by some fit and proper fusion Act, all made courts of law plus equity, and courts of equity plus law, and all other modes be abolished? Yet, even as to motions as Chancery practice now stands, some motions (and it is often hard to determine *a priori* which) must first be brought on affidavits, and notice of motion before some subordinate officer of the court, who, when he has heard the

## FUSION OF LAW AND EQUITY.

motion on the affidavits, has no power to grant any relief, and can do nothing even if the motion be ever so clearly well founded, beyond giving the applicant leave to make his motion over again upon a new notice of motion before the court or a judge. Why should not the litigants be freed from the useless delay and expense of such double motions, one of which is about as useful as a fifth wheel would be to a mail-coach? Why not have, as at law, but one motion, before some one who could decide it, subject to some simple, inexpensive appeal from such decision? Again, as to fixing arbitrarily a few days each within which each of the unnecessarily numerous and somewhat circuitous steps of Chancery procedure must be taken, and then punishing the slightest slip in not moving in time, or in the precise mode prescribed, with such unreasonable consequences as total denial of relief, or of so much of the relief as the error relates to, or putting the erring, or often surprised or over-reached party, to as much trouble, delay and expense to obtain relief as would suffice to carry a common-law suit through a law court (which is what I presume "Equity" praises as a Chancery practice so framed as to allow as little delay as possible). These are, in my opinion, amongst the worst features of Chancery practice, and great sources of irritation. Why should not all such relief be obtainable in Chancery as at Law, with ease, celerity, and cheapness, and at any time while litigation is pending, in the same manner as relief is obtainable at law from snap judgments and such like mere interlocutory proceedings? Depend upon it, every saving of time thus gained is dearly purchased. What is it but one mode of running an ill-contrived machine at a rate beyond its proper capacity, by making it hop and skip over without performing what a simpler and better designed machine would, without hopping or skipping over anything, have perfectly accomplished in the same or less time? Nevertheless, I do not contend that there are not many things in Chancery which can be imported with advantage into the law courts at the present time, as was done in the past; nor that the importation should not be made

as soon as possible; for instance, I acknowledge the unsatisfactory nature of the law affecting appeals from decisions on evidence pointed out by *Moss, C. J. Trompou v. Taylor*, 1 App. Rep. (Ont.) 108, and much prefer the rule in equity defined by Proudfoot, V.C. in *Armstrong v. Gage*, 25 Grant 38; but, instead of attempting to defend, we are trying to remedy all defects of Law as well as Chancery.

So far our Legislature has given the Court of Chancery full common-law jurisdiction, in addition to its own, but has only given the law courts a small portion of Chancery jurisdiction in addition to their own. We thus have the anomaly of complete fusion in the Court of Chancery, and of only very incomplete fusion in any court of law; while whatever fusion, more or less, any court of law has is upon this defective plan—that it fails to supply any court with anything beyond the practice and procedure it previously had. It does nothing towards supplying to any of them the machinery required to satisfactorily transact their new business, but leaves the judges of each court without re-assorting them, so as to place at least one equity and one common-law judge in each court, and thus fitting them, to some extent at least, for the task they were expected to perform, and without any legislative assistance whatever to grapple with the subject and endeavour to supply all needs by such rules of their own court only, as their own total want of familiarity with the new business thus thrust upon them might suggest. It is needless to say that that method has not attained the most appropriate machinery for any court. But all those mistakes can be remedied now by statute, by completely fusing law and equity in every court, re-assorting the judges as they ought to be, abolishing separate modes of procedure and practice in the several courts, and obliging them all to use but one uniform procedure and practice, and making that procedure and practice the best that can be devised. This can, I think, be done in this way: have but one bureau in Toronto, with branches in the counties, for transacting indiscriminately all the business of all the courts now separately carried on in their

## FUSION OF LAW AND EQUITY.

separate offices ; close all those separate offices, and distribute all the clerks and officers now in them throughout the several departments of the new bureau ; equalize the business in all the courts on the same principle as that whereby it was equalized in the Courts of Q.B. and C.P. Either by the mode adopted as to those Courts, or supposing the form of Chancery pleading to be (as "Equity" considers it ought) adopted in every court, then don't entitle the bill in any particular court, nor address it to the judges of any particular court, but leave blanks for the court, which the clerk it would be filed with should fill in as he distributes the suits ratably amongst them. The statute might supply the general features of the new practice and leave the details to be arranged by all the judges of all the courts, with power to them all, or a majority of all of them, at all times, to make, repeal, and alter all rules at discretion ; all rules to apply to every court equally, and no court to be capable of passing rules to apply to itself alone or otherwise than to every court, and as in such case every judge would, no doubt, borrow light as to what he least understood from his associates most familiar with it, yet not be so blinded by long professional bias as not to be able to see and point out to his fellow judges, and thus obtain the remedy of the imperfections of the system which was not originally his. All practice and procedure should thus soon be made, and always kept, not only uniform, but of as perfect a quality as human mind can devise ; and we may, at all events, reasonably expect much better than at present.

As matters now stand, however, the complete fusion of law and equity in the Chancery Court enables it, when litigation is originated there, to settle all disputes, &c., &c., at law and equity, between the parties, and thus effectually prevents double litigations, one in Chancery and the other at Law—a result very favourable to that court and its practitioners ; but it has been found that when a mere law suit is sued in Chancery, the delay and expense of working it out there is much greater than at Law—a result which could not happen if Chancery

practice and procedure were as simple and economical as at Law ; while, on the other hand, if the litigation be originated in a law court, its want of full and complete equitable jurisdiction frequently prevents its settling all the legal and equitable matters in dispute between the parties, and, as our appeal reports abundantly testify, thus causes double litigations—one at Law, the other in Chancery, and even sometimes causes this further bad result, that after a judgment at Law is recovered, another suit in Chancery is brought upon that judgment to enforce it ; all which are results most unfavourable to the law courts and all practitioners in them ; yet, notwithstanding the injury their defective equitable jurisdiction thus inflicts on the law courts, all Chancery business that can be there transacted (and they have been for years back transacting a great deal of equity business) is invariably transacted as speedily and economically and satisfactorily, as if it were mere common-law business—a result which could not happen if the principles of legal practice and procedure were not adaptable to Chancery business, and simpler and more economical than Chancery practice and procedure.

It is very clear our Legislature has thus treated the Court of Chancery as a fond mother would treat her own child, by giving it, if not all its wants, at least all she thought it wanted ; and the law courts, as that mother, if she happened to be also a stepmother, might be expected to treat her step-children ; but why that course was adopted is difficult to guess, unless the design was (as many suspect) to enable Chancery practitioners to draw business with both hands from the law courts, while practitioners in the law courts could only draw with one finger from Chancery.

I am aware that our opponents profess to excuse that course by asserting that the law courts received no more equity jurisdiction, because though the Chancery Judges were capable of mastering Common Law, the Judges of the Law Courts were not capable of mastering equity, or did not choose to take the trouble to learn anything new, and because the law courts had not the ma-

## CORRESPONDENCE—REVIEWS.

chinery to properly deal with it; to all which I answer, I neither believe the sincerity or truth of 'he excuse nor the assumed inferiority of the Judges of the Law Courts; but, supposing all were as they assert, why could not the Legislature have supplied the law courts with the required machinery? and what sort of a legislative measure is it which gives us a Court of Appeal—which tries appeals from Chancery and the Law Courts indiscriminately—yet is, and always was, composed of but one Chancery to three mere Common Law men: and if those one Chancery and three mere Common Law Judges have hitherto decided, and still decide, satisfactorily, all Chancery questions on appeal, why could not each law court, with proper machinery, given it by Statute, and one Equity Judge in it, equally well decide all equity questions, subject to appeal?

From the foregoing it will be seen I am not a madly zealous partizan of Chancery or Common Law, who cannot see the defects of both, or the good features which both undoubtedly possess, or who would not wish to improve all that can be improved in every court. My motto is fair play to all, favours to none; neither do I find any fault with the judges of any court. They have all done the best they could with the sort of machines supplied them. My aim is to increase their usefulness, by giving them better machines to work with. I yield to no man in my admiration of the essential principles of equity, but I know by experience that it is possible to so completely lose the essence of equity in a curiously entangled mass of red tape, that at least half its worth is thereby destroyed.

I have the honour to remain,

Yours, &c.,

Q.C.

## REVIEWS.

**THE MAGISTRATES' MANUAL.** Being annotations on the various Acts relating to the rights, powers and duties of Justices of the Peace; with a Summary of the Criminal Law. By S. R. Clarke, Barrister-at-Law. Toronto: Hart & Rawlinson. 1878.

In olden days, in Upper Canada, one of the few law books of colonial origin was "Keele's Justica." By degrees this well-known compendium became obsolete by changes in the law, and in 1865 Mr. McNab, the County Attorney for the County of York, published his "Magistrates' Manual," and for years this was the *vade mecum* of those who administered "home-spun justice" in this Province. It was but little else, however, than a collection of statutes or statutory enactments, arranged under appropriate heads, with a number of forms. The volume before us is somewhat less in bulk, but is more ambitious, and an improvement in various ways upon its predecessors. At the present time the criminal law of Canada (and this book does not embrace the local laws of any Province) and the Acts respecting the duties of magistrates are in a comparatively compact shape, so that much of an author's work is done to his hand. But Mr. Clarke has, theoretically at least, made the subject his own by his research in preparing his edition of the "Criminal Laws of Canada," published a few years since, and has thus been enabled to give to the "Justices" of the Dominion much valuable information in a convenient compass. The Acts relating to the Criminal Law are not given in full, but referred to in appropriate places. The Acts regulating the duties of justices in respect of various matters are given *in extenso*, with reference to decided cases, together with a summary of the Criminal Law of Canada, alphabetically arranged.

**DIGEST OF ONTARIO REPORTS.** By C. Robinson, Q.C., and F. J. Joseph, Barrister.

Part XIII. contains, amongst others, the important titles of Pleading at Law; Pleading in Equity; Practice at Law; and Practice in Equity. The heaviest part of the work is now done, and a few more numbers will complete the Digest. We may well add that when it is done the compilers will have no need to be ashamed of their handy work.



Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 41st VICTORIA.

During this Term, the following gentlemen called to the Bar, viz. :—

GEORGE FERGUSSON SHEPLEY.  
WILLIAM JAMES CLARKE.  
WILLIAM EGERTON HODGINS.  
JAY KETCHUM.  
ROBERT SHAW.  
HAMILTON PARKE O'CONNOR.  
WILLIAM CAVEN MOSCRIP.  
JAMES JOSEPH ROBERTSON.

The following gentlemen were called to the Bar on 30 Vict. chap. 31. :—

DANIEL O'CONNOR.  
JOSEPH BAWDEN.

The following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

*Graduates.*

ALEXANDER DAWSON, B.A.  
THOMAS DICKIE CUMBERLAND, B.A.,  
WILLIAM BANFIELD CARROLL, B.A.

*Matriculants.*

FRANCIS BADGELEY WILLIAM MOLSON GILBERT LILLY.

JOSEPH MARTIN.  
J. A. C. REYNOLDS.

*Junior Class.*

HUGH ARCHIBALD MACLEAN,  
WILLIAM BURGESS.  
LOUIS F. HEYD.  
JAMES FOSTER CANNIFF.  
JOHN DOUGLAS GANSBY.  
GEORGE CORRY.  
EDMUND WALLACE NUGENT.

CHARLES PATRICK WILSON.  
DAVID MCARDLE.  
THOMAS HISLOP.  
WILLIAM ALEX. MCLEAN.  
ALEXANDER JOSEPH WILLIAMS.  
JAMES JOSEPH PANTON.  
WILLIAM MELVILLE SHOEBOOTHAM.  
JAMES GAMBLE WALLACE.  
GEORGE MOREHEAD.  
WILLIAM GEORGE SHAW.  
ROBERT PATTERSON.  
HARRY HYNDMAN ROBERTSON.  
JAMES ALEX. SHETTLÉ.  
MOSES MCFADDEN.  
ARTHUR B. FORD.  
GEORGE HIRAM CAPRON BROOKE.

*Articled Clerk.*

HENRY WHITE.

PRIMARY EXAMINATIONS FOR  
STUDENTS-AT-LAW AND ARTICLED  
CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

CLASSICS.

Xenophon, Anabasis, B. I. ; Homer, Iliad, B. I. ; Cicero, for the Manilian Law ; Ovid, Fasti, B. I., vv. 1-300 ; Virgil, Æneid, B. II., vv. 1-317 ; Translations from English into Latin ; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic ; Algebra, to the end of Quadratic Equations ; Euclid, Bk. I., II., III.

ENGLISH.

A paper on English Grammar ; Composition ; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.



LAW SOCIETY, HILARY TERM.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III, inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

Or GERMAN.

A Paper on Grammar. *Museaus, Stumme Liebe. Schiller, Lied von der Glocke.*

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or, Virgil, *Æneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I, II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography — North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and

Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

SCHOLARSHIPS.

*1st Year.*—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

*3rd Year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

*4th Year.*—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

N.B.—After Easter Term, 1878, Best on Evidence will be substituted for Taylor on Evidence; Smith on Contracts, for Leake on Contracts.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR MAY.

2. Tues..English slave trade abolished, 1807.

5. Sun. . Queen Victoria declared Empress of India, 1876.

7. Tues. Primary examinations—written.

8. Wed. Primary examinations—oral.

4. Tues..Sittings of the County Court of the County of York begin. Intermediate examinations.

5. Wed..Intermediate examinations.

6. Thur.Examinations for certificates of fitness.

7. Fri. .Examinations for call.

8. Sat. .Examinations for call with honors. Hon. D. A. Macdonald, Lieut.-Gov. of Ont., 1875.

9. Mon..Easter Term begins. Law Society Convocation meets.

1. Tues..Law Society Convocation meets,

2. Wed..Earl Dufferin, Gov.-Gen., 1872.

4. Fri. . Queen Victoria born, 1819.

5. Sat. .Law Society Convocation meets.

6. Thur.Proudfoot, V.C., appointed Vice-Chancellor, 1874.

CONTENTS.

EDITORIALS :

Striking off the Rolls.....

Dissentient Opinions.....

Unprofessional Advertisements.....

PAGE

137. 138

137

137

CANADA REPORTS :

ONTARIO :

COMMON LAW CHAMBERS.

Re A. B. & C., Attorneys.

Lien of Town Agent.....

Trust and Loan Company v. McGillivray.

Ejectment by mortgage—Staying proceedings—Costs of an abortive sale.....

MUNICIPAL CASES.

Regina ex rel. Haner v. Robert.

Regina ex rel. Taylor v. Stevens.

Municipal Law — Disqualification—Contract with or on behalf of Corporation..

NOTES OF CASES :

Court of Appeal.....

ENGLISH REPORTS :

Digest of the English Law Reports for May, June, and July, 1877.....

LAW STUDENTS' DEPARTMENT :

Questions, Hilary Term Examinations.....

REVIEWS.....

BOOKS RECEIVED.....

LOTSAM AND JETSAM.....

142

143

144

144

145

157

159

159

160

Canada Law Journal.

Toronto, May, 1878.

An Attorney of the Courts of Ontario and a somewhat prominent public man has recently been struck off the rolls for misappropriation of clients' money. The case was a very gross one. It would have been better perhaps if a little speedier justice had been done in this case, but there was a natural reluctance to deal with even a semblance of harshness to one who had some years ago occupied a high position. If the pro-

fession were promptly purged of those who bring disgrace upon their brethren, the public would not judge it by the black sheep only, but would respect it, for what in truth it is, a class most honourable and trustworthy.

We are glad to extract from the *Solicitors' Journal* of 13th April, the following observations on the subject of dissenting judgments which has lately been somewhat discussed in our columns. After commenting on the practice of the Privy Council, that no publication be made by any man, how the particular voices and opinions went, the *Journal* proceeds: "We should be glad if the House of Lords would adopt a similar rule. It appears to us that the effect of the decision of a final Court of Appeal in settling the law should never be marred by "the publication of dissentient opinions."

These hard times seem productive of novel advertisements by men in the profession who ought to know better. One, who puts half the alphabet after his name, issues a circular, reminding us of the effusion of a travelling dentist. He informs the public that he can give "good references as to honesty, integrity, etc., so that parties may be assured that all their moneys collected (less charges) will be paid over to them." By a *N. B.* we learn that no person without a careful investigation of a title "is justified or can be secure in risking the investment of moneys in Real Estate." We are glad he has evolved this important and mysterious truth. An enterprising legal firm in another place issue an enormous card in the shape and style of an Insurance Almanac, thereby claiming that the advertisers are the most desirable persons to borrow money from. The

## STRIKING ATTORNEYS OFF THE ROLL.

amount of colour displayed suggests the thought of a Barrister appearing in Court in a velveteen coat, a red flannel shirt and a white tie. We suppose such an advertisement is the only means by which this firm can acquire business. With these things before us we are hardly in a humour to call attention to an Impudent Invader who "is prepared to do all manner of conveyancy at charges lower than anyone in Town," to say nothing of collecting and posting accounts, &c. He also indulges in a *N.B.*—"Legal advice free of charge." This last part of the advertisement is the only redeeming point. Legal business in his town must be rather brisk, in consequence of this liberality on his part.

### "STRIKING OFF THE ROLL."

A good deal of attention has lately been directed to the penal jurisdiction which the Courts exercise against their own officers, in divesting them of their privileges, and degrading them from their professional position. We propose shortly to consider the cases in which attorneys and solicitors will be struck off the rolls of the Courts, as being unworthy of the confidence of the public.

The fiftieth general Order in Chancery indicates that the solicitor may be prohibited from practising for malpractice or misconduct as a solicitor, or other sufficient cause. By the Attorneys Act, (Rev. Stat., cap. 140) attorneys or solicitors acting as agents for unqualified persons are liable to be struck off the rolls (sec. 25), and by the next section it is enacted that either of the Superior Courts of Law, or the Court of Chancery may strike the name of any attorney or solicitor off the roll for default by him in payment of money received by him as attorney or solicitor.

The subject may be conveniently dealt with under this broad classification that the solicitor becomes amenable to the summary jurisdiction of the Court when he retains money obtained by him in his professional capacity, or where he misconducts himself in his office of solicitor.

In the first place, then, he is liable to be struck off the roll if he makes default in the payment of money directed to be paid on a summary application. In *Stephens v. Hill*, 10 M. & W., 28, 32, Lord Abinger adverts to the origin of this practice, by referring to *Strong v. Howe*, 1 Strange, R. 621, and says ever since that time, applications of a similar nature have been very common, in all cases where an attorney in his professional capacity has received money, for which though he might be made accountable in a civil action, the Court will compel him to do summary justice, without putting the client to the necessity of bringing one. Indeed, it would seem to be essential that the client should make a summary application for the payment of the money improperly withheld, because, if he first sues for the amount and recovers judgment, it is too late then to apply to have the defendant struck off the roll. It is said that the character of solicitor is merged in that of judgment debtor, and that obligations of a different character arise by virtue of the judgment. This was expressly held in *Re Corbet Davis*, 15 W. R., 46; 15 L. T. N. S., 161; 1 W. N., 321. In order to the exercise of this summary jurisdiction, it is requisite that the money should be received by the solicitor by virtue of his professional employment, or as a consequence of his professional character. This point was much discussed in *Re Keys*, 13 C.P., 283; see also *Anon.*, 12 C. L. J., 204.

Where a solicitor is appointed a trustee under a will or other instrument, it is assumed that his professional character

## STRIKING OFF THE ROLL—NOTES OF RECENT DECISIONS.

has been one of the considerations influencing the appointment, and his wrongful retention of moneys as such trustee renders him amenable to the penalty in question: *Re Chandler*, 22 Beav. 253.

In like manner, to make a transition to the second part of our subject, if a solicitor wilfully advises a breach of trust, he is liable to be struck off the roll for his misconduct. In such a case, to give the Court jurisdiction, there must be on the part of the solicitor either a design to benefit himself, or assistance rendered to his client in a scheme which he knows to be dishonest and fraudulent: *Barnes v. Abdy*, L. R., 9 Ch., 251.

It has been held in the Privy Council that a deliberate mis-statement of facts upon the face of a deed is highly censurable, but the solicitor guilty of such a misstatement is not liable to be struck off the roll on that account, unless he has acted with fraudulent intent, and this intent is brought home to him: *Re Stewart*, L. R., 2 P. C., App. 88.

Where a solicitor advises a client who is a trustee, to commit a breach of trust by selling out stock, and the solicitor himself profits by such a breach of trust, he is liable to be dealt with summarily by the Court, as in *Goodwin v. Gosnell*, 2 Coll., 457. So when he had fraudulently abused the confidence of his client, even though there had been considerable delay and offers to compromise, and the solicitor had been arrested under a *ne exeat*, and had been in prison for ten months, an order was made to strike his name off the roll: *Re Martin*, 6 Beav. 337. Nearly all the cases on this branch of the law are collected and very fully discussed in *Re Attorney*, 39 U.C.R., 171.

In all such applications, the Court keeps in view and acts on the principle that the exercise of this summary juris-

diction against its own officers is for the benefit of the public and to secure the community from being preyed upon by dishonest and unprincipled persons. To borrow the pointed language of Knight-Bruce, V.C., in one of the cases cited, "it is not the least urgent of the duties of those in whose hands is placed the administration of justice, to mark, to censure, to repress, and if necessary to extirpate from the Courts, such men, as by abusing the functions and privileges of so important a profession, become a scandal and a pestilence to society."

## NOTES OF RECENT DECISIONS.

BROWN v. G. W. R. COMPANY.

[Communicated.]

This case\* presents some interesting points; and its effect is of importance not only to the profession but also to the public. A Grand Trunk Railway train, of which the plaintiff was conductor, was crossing on the level the defendants' railway. The engineer of the defendants, when a short distance from the crossing, endeavoured to stop his train by means of air-brakes, which failed. It being too late to use the hand-brakes, the result was a collision and the injury complained of by the plaintiff.

The plaintiff declared upon the negligence and unskilfulness of the defendants. It was held, Moss, J. dissenting, that the 19th Vict. cap. 92, s. 10, imposed an absolute duty on the defendants to stop for three minutes before such a crossing, and judgment was therefore given for the plaintiff. The first question that presents itself is that upon which the above-named learned judge based his dissenting judgment, namely, the consideration of whether the defend-

## NOTES OF RECENT DECISIONS.—BROWN v. G. W. R. Co.

ants were negligent, apart from the statute; and if so, how far the plaintiff contributed to the accident. Then, whether the defendants were negligent by reason simply of their breach of a statutory duty. And lastly, whether, if the only negligence be the breach of the statute, the plaintiff can succeed on the simple declaration of negligence.

On the first question, it may be well argued that the defendants were not guilty of negligence, since they had supplied themselves with the best known apparatus for bringing their train to a stop; that the fact itself of their possessing the latest invention showed them to be diligent rather than negligent in providing means for stopping their trains. "In a word," says the learned judge who dissented, "the air-brakes which they used were the best procurable contrivance for preventing a collision,"—upon which remark, it must be admitted, the fact of the collision itself is rather a severe commentary. So far as the providing themselves with the best known contrivance goes, it may be conceded that the defendants are acquitted of negligence. But, while they may have been very diligent in providing themselves with this appliance, the plaintiff is still entitled to complain that they were negligent in its use. This leads to the question, Why are they said to be the *best* known contrivance? Because a much greater force can be applied to the wheels, and therefore the train can be stopped in a shorter time than with hand-brakes—and time is saved. This is, confessedly, a benefit to the defendants. On the other hand, these brakes are shown to have failed, on an average, once in three months before this. So that they are devoid of the *certainly* which the hand-brakes possess. We have then before us two methods of producing a desired result. On the one hand, a

method whose chief characteristic is to save time, with a possible—rather probable—failure of effect; on the other, certainty of action with a small loss of time. So when negligence is imputed, and, of the two courses to adopt, the defendants reject that which is certain, and adopt that which is uncertain, it seems only reasonable to say that, having chosen to run the risk, they should abide by the consequences. And it is manifestly no answer for the defendants to say that the adoption of the certain method would have resulted in a loss of time to *themselves*; when the experiment of economizing time has resulted in an injury to the party complaining. What skilled and careful engineer, being apprised of the impending danger of a collision, or an open drawbridge, in time to stop the train by means of the hand-brakes, or in time to use them if the air-brakes failed, would choose to let that valuable and irrecoverable time slip by, and rush on to imminent danger, trusting to an appliance which had already failed him on an average once in every three months! And what weight would his plea of economizing time have, in case of an accident? And at this point, where they must have known of the absolute duty imposed upon them to stop, where there was an especial danger from trains running on a different road, and at times not harmonizing with their own, there was certainly an especial duty cast upon them to use extraordinary vigilance and diligence in proportion to the increased risk—and this even apart from the statute. The necessity for increased vigilance imposes on them a duty to resort to a *certain* method of avoiding any impending danger. And if they rely on the fact that the danger is not always present there, they are guilty of more than negligence, which implies a mere passive state of the will—they are guilty of an actively

## NOTES OF RECENT DECISIONS.—BROWN v. G. W. R. Co.

formed intention of running an unwarranted risk. When it is admitted that the excellence of the air-brakes, is only conditional, who so bold as to deny that they are under an obligation to have some *certain* method of stopping their trains, in case of the failure of the air-brakes, other than the necessary ultimate cessation of motion consequent upon the withdrawal of the impelling force.

On this assumption, then, even supposing the excellence of the air-brakes in economising time to furnish a complete answer to the party complaining of injury from their use, was the action of the defendants in running so near the crossing as they did before attempting to stop, an actual saving of time? Plainly not. The mathematical mind, even in an embryotic state, will hardly assent to the proposition that to have stopped for three minutes, at a distance of a quarter of a mile from the crossing, would have occasioned a greater loss of time than to have stopped, for three minutes, at a distance of fifty yards from the same point.

If there be an admission of negligence on the part of the defendants in the manner of using their air-brakes, we are then brought to the discussion of whether or not the plaintiff contributed to the accident. On the declaration as restricted by the learned judge already named, the defendants apparently could not accuse the plaintiff of contributing to the accident; for his being at the crossing—though perhaps negligently—was nothing more than a condition necessary to its happening; while the proximate cause was the bursting of the tube, and the consequent failure of the air-brakes to take effect. And we are again brought face to face with the question which we have already noticed, “was the manner of using them negligent?”

If there were no common law negli-

gence, and the plaintiff were driven to show breach of a statutory duty, there would seem to be more difficulty in coming to a satisfactory conclusion. There was, no doubt, an intention on the part of the defendants to stop, whether in obedience to the statute or not. From the report it does not appear that they intended to stop for a less time than three minutes; and when it was their duty so to stop, we must, in all fairness, presume that they would have complied with the statute, unless prevented by the accident to the brakes. That the duty was an absolute one seems beyond dispute; and we are again referred to the means by which they tried to fulfil it, and their failure. Whatever may have been the cause of the breach is immaterial in this view of the case, so that the breach has been committed. The question, then, is this, Is the breach of a statute “negligence,” in the sense in which it is alleged in the declaration?

If it be asserted that where the plaintiff has declared upon negligence simply, and shows a breach of a public statute, he must fail? then the inference is irresistible that breach of a public statute is not negligence, *per se*; or being negligence, cannot be complained of except the statute be specially declared upon. As to the first, Lord Brougham says, in *Ferguson v. Kinnoul*, 9 Cl. & F. 289, “If the law casts a duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures.” No distinction is drawn between the different sources from which law emanates. A duty is imposed. It is broken. The result—an action. Whence the duty? Common Law. The plaintiff succeeds. Does it make any difference that the duty is imposed by another and equally powerful arm of the law; or that it springs from the other of the two tributa-

ries which, by commingling their streams, form the mighty basin upon whose uncertain currents the confiding plaintiff trusts himself? So that there be a public duty and a breach, what difference does it make whence the duty arises? And if the plaintiff declares that the defendant has neglected a duty, is it an answer to say that the alleged duty is one imposed by statute, and that since the plaintiff has not declared the source whence it sprung, he cannot recover? Sir William Blackstone says, "A general or public Act is an universal rule that regards the whole community, and this the Courts of Law are bound to take notice of judicially and *ex officio*, without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it: Com. I, 86. The plaintiff is not restricted by the statute to any particular form of action. It is true it does not even declare that the person injured by the neglect of this duty shall have an action. But this omission is hardly sufficient ground for denying a right to an aggrieved party, to maintain an action for injury resulting from the neglect of its directions. It would be idle for the Legislature to impose a duty, and then give no remedy for its breach. Its silence on this point, as well as the omission to impose a penalty, seem to lead to the supposition that it was intended to leave the party injured to the ordinary action for negligence. In fact, the imposition of a penalty, in many cases of this kind, would work injustice. For where many persons are injured, the first one suing for the penalty would obtain some slight compensation, and at the same time would discharge the aggressors from further liability. The reference of the negligence to the breach of the statute alone, however, makes it doubtful whether the plaintiff should not be debarred from complaining of the

breach by the defendants, since he was *in pari delictu*. For, if the duty were an absolute one, it is as strictly applicable to the plaintiff as to the defendants; and how can he be heard to complain of the damage done to him, while he was in the very act of committing a breach of it himself?

The result of the case, as it has been decided, certainly does require especial care to be taken in the use of air-brakes; but railway companies can hardly complain of being obliged to exercise great vigilance and care in using a confessedly risky appliance. Even supposing the result to be the total prohibition of the use of the air-brakes, that is no valid ground upon which to rest the decision of the case.

An almost exact parallel to this case is to be found in the case of *Tuff v. Warman*, 2 C. B., N. S., 740, which was not cited to the Court. There the plaintiff declared on negligence simply, and the breach of a duty prescribed by a similar statute was given in evidence to support it, on which he succeeded.

E. D. A.

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## CANADA REPORTS.

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### ONTARIO.

#### COMMON LAW CHAMBERS.

(Reported for the *Law Journal*, by N. D. BUCK,  
Student-at-Law.)

Re A. B. & C., ATTORNEYS.

*Lien of Town Agent.*

*Held*, that, as against their principal, a country attorney, town agents have a general lien upon all documents, money and articles coming into their hands in the course of their agency business, without regard to the purpose for which they were received.

[February 7-8.—Mr. DALTON.

*Watson*, for a country attorney, obtained a summons calling upon a firm of attorneys, who had until lately acted as his town agents

C. L. Cham.] RE A. B. & C., ATTORNEYS—TRUST & LOAN CO. V. MCGILLIVRAY. [C. L. Cham.]

to shew cause why they should not deliver up a certain promissory note in their possession.

The facts appear from the argument.

On the return of the summons

*Symons* shewed cause.

The agents have unpaid general agency bills, the amount of which greatly exceeds that of the note. Some of these bills have been taxed and judgment obtained upon them; others have only been rendered. Although as against the client the lien of the town agent may be particular, that is, extends only to costs incurred in the particular matter in which the note was received, as against the attorney the lien is a general one, and that independently of any agreement for a lien. *Marshall on Costs*, 460; *Stokes on Liens of Attorneys*, 179 *et seq.* *Re Cross*, 4 Chy. Cham. 11, shews that the same principles have been adopted by the Courts here.

*Watson, contra.*

The note is one made by the client to the attorney in payment of a particular bill of costs; it was discounted, and, after protest, was taken up by the attorney out of his own money. Subsequently, at the instance of the client, an order was made for the taxation of this bill, with the usual provisions as to payment and delivery up of papers. The note was sent to the town agents to be used upon the taxation of the attorney's bill, for the sole purpose of being used as evidence of an admission by the client. Before the note was produced or the taxation completed, the agents voluntarily discharged themselves, and refused to deliver up any papers in their possession, claiming to have a general lien thereon. The country attorney denies his liability to the agents; that issue cannot be tried on this application; the question here is one of right between principal and agent, not of liability. The note not having been paid, the attorney need not give the client credit for it, but may proceed on his bill, and if he did so the client would be entitled to the note. This application is merely in anticipation of one by the client, to whom the agents are bound to deliver up the note: *Bell v. Taylor*, 8 Sim. 216; *Stokes* on "Liens of Attorneys", 180. The possession of the agent is possession of the attorney: *Watson v. Lyon*, 7 DeG. M. and G. 298. The agents having discharged themselves, cannot set up a lien: *Re Faithfull*, L. R. 6 Eq. 328.

*Symons* in reply.

Although the town agents have discharged themselves, it is not in such a case as this that they would be ordered to deliver up, and if it were it would only be upon an undertaking to return them: *Robins v. Goldingham*, L. R. 13 Eq. 440.

Mr. DALTON.—Town agents have a general lien on all documents, money and articles coming into their hands in the general course of their agency business as against the attorney himself, irrespective of the purpose for which they were received: *Stoke* 179 *et seq.* The decisions in *Re Faithfull* and *Robins v. Goldingham* are not applicable to the present case.

*Summons discharged, with costs.*

TRUST AND LOAN COMPANY V. MCGILLIVRAY.

*Ejectment by Mortgagee—Staying proceedings—Costs of an abortive sale.*

*Held*, that a mortgagee moving to stay proceedings in an action of ejectment by the mortgagee must pay the costs of an abortive sale under a power in the mortgage. [March 1.—Mr. DALTON.]

This was an action of ejectment by mortgagee against mortgagee.

*Spencer* obtained a summons to stay proceedings upon payment of the principal and interest and costs.

On the return of the summons,

*Marsh* appeared to consent to the order, but produced an affidavit showing that the plaintiffs had proceeded under a power of sale in their mortgage, but that the sale had proved abortive, and submitted that the defendant must pay the costs of this abortive sale as well as the costs of this action before proceedings could be stayed. He pointed out that the proceedings in ejectment were taken to complete the remedy under the power of sale, and, in effect, for the benefit of the mortgagee, for it was found that, when on a sale under mortgage possession could be given, a larger sum was obtained for the property. He cited *Doull v. Neale*, 10 W. R. 627.

*Spencer, contra.*

Mr. DALTON held that the plaintiff was entitled to proceed, unless the defendant paid the costs of the abortive sale as well as the principal, interest, and the costs of this suit.

*Usual order, with above provision as to the costs of the abortive sale.*



Mun: Case.]

REGINA ex REL. HANER v. ROBERT—NOTES OF CASES.

[C. of A.]

## MUNICIPAL CASES.

REGINA ex rel. HANER v. ROBERT.

REGINA ex rel. TAYLOR v. STEVENS.

*Municipal law—Disqualification—Contract with or on behalf of Corporation.*

*Held*, that a person who was surety for a corporation in a bond for security for costs had "an interest in a contract with or on behalf of the corporation" within the meaning of Rev. Stat. cap. 174, sec. 74.

[March 7-14—Mr. DALTON.

In these cases summonses in the nature of writs of *quo warranto* were issued, calling on the defendants to show by what authority they held respectively the office of Reeve of the Township of Chatham and Reeve of the Township of Dover.

One of the grounds upon which the summonses were issued was that the defendants, at the time of their election, were sureties in a bond given by their townships as security for costs of an appeal, and were therefore disqualified under Rev. Stat. cap. 174, sec. 74.

*M. C. Cameron, Q. C.*, shewed cause.

This is not a contract "with or on behalf of the Corporation" within the meaning of the Statute.

*Ferguson, Q. C.*, contra.

This is a contract with the corporation: *Hungerford v. Hungerford*, Gilbert's Equity Cases, 1742; *Pitman on Principal and Surety*, 125; *Burge on Suretyship*, 378. Each of the defendants is interested jointly with the corporation in a contract expressly on behalf of the corporation. The defendants are interested in the contract within the spirit and letter of the Act, and come within the mischief contemplated by it. Their interest, should the abandonment of the appeal or a resolution to indemnify the sureties be discussed in the Council, would not be identical with that of their constituents.

Mr. DALTON.—I think that this is a contract both with and on behalf of the Corporations within the meaning of the statute, and I think, further, that it comes within the mischief contemplated. The defendants are unseated, and there must be a new election. The defendants must pay the costs.

*Judgment accordingly.*

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

## COURT OF APPEAL.

From C. C. York.]

[April 11.]

WERNER v. SIBBALD.

*Abandonment of excess—Effect of.*

The commencement of a suit for an amount less than the entire claim is not *per se* a release of the excess; but the part so abandoned cannot be sued for, after the recovery of judgment in such suit.

*Nugent* for the appellant.*Monkman* for the respondent.*Appeal allowed.*

From C. C. Renfrew.]

[April 11.]

RE FAIR &amp; BELL.

*Insolvent Act, 1876—Garnishment after assignment.*

Upon A's insolvency, T., a creditor residing in the County of Renfrew, proved his claim, and afterwards became insolvent. On the 7th of March, 1877, F. & A's assignee, not having heard of T's insolvency, collocated him on the dividend sheet for the amount due on his claim, and on the 22nd of the same month certain creditors of T. took proceedings in the Superior Court at Montreal to garnish this amount. Subsequently, in reply to a letter from one B, T's assignee, demanding payment of the dividend, F. informed him that some persons were endeavouring to get payment of this dividend from him in Montreal; but he neither mentioned who they were, nor specified the nature of their claim. He, however, asked for evidence of B's official character, which request was immediately complied with. In accordance with the practice of the Courts in Quebec, on the 30th of April, F. made an affidavit of the position he occupied towards the principal debtor, in which he recited the above facts, but took no further action in the matter. He neither advised B. that the declaration had been made, nor held any further communication with him. No opposition being offered, an order was made for the payment of the amount, debt and costs, by F., within fifteen days. Without waiting for the expiration of

the fifteen days, and without giving B. any notice, F. paid the amount. *Held*, that B. was entitled to recover the amount from F., and that F. could not protect himself on the ground that he had paid the money in obedience to the order of a Court of competent jurisdiction, as the Court had no authority to make such an order after T's assignment, the only remedy then available to his creditors being that given by the Insolvent Act; but even if the judgment had been that of a Court of competent jurisdiction, it could not defeat B's rights, as he was not a party to the proceedings, and was not affected with notice thereof.

*Bethune, Q.C.*, for the appellant.

*Richards, Q.C.*, for the respondent.

*Appeal dismissed.*

From C. C. Frontenac.]

[March 11.]

RE ERLY.

*Insolvent Act 1875—Secs. 70, 71, 72, 73—Damages on cancellation of lease.*

One E. agreed to rent certain premises for ten years, on condition that certain improvements were made. The agreement was evidenced by a letter from the landlord, to the terms of which E. assented; but no lease was executed. After the alterations were completed E. entered, and while still in possession under this agreement became insolvent. The inspectors cancelled the lease and delivered up the premises at the end of the current year—whereupon the landlord claimed to be allowed damages under the 70th and three succeeding sections of the Insolvent Act of 1875.

*Held*, affirming the decision of the County Court Judge, that it was not intended to limit these sections to leases valid only at law, but that they applied equally to leases valid in equity, and that the landlord was therefore entitled to prove.

*Delamere*, for the appellant.

*O'Sullivan*, for the respondent.

*Appeal dismissed.*

From C. C. Hastings.]

[April 16.]

RE JONES.

*Insolvent Act, 1875—Double proof.*

Where a creditor holds security on the partnership estate for the individual liability of the insolvent, he is entitled to prove against

the separate estate without putting a value on such security.

*E. Martin, Q.C.*, for the appellant.

*G. H. Dickson* for the respondent.

*Appeal dismissed.*

## ENGLISH REPORTS.

### DIGEST OF THE ENGLISH LAW REPORTS FOR MAY, JUNE, AND JULY, 1877.

ACCESSORY—See MURDER.

ADMINISTRATION—See EXECUTORS AND ADMINISTRATORS.

AMBIGUITY—See WILL, 4.

ANNUITY—See PROOF.

APPOINTMENT—See ELECTION.

AUCTION—See SALE, 4.

BAILOR AND BAILEE—See MASTER AND SERVANT, 2.

BANKRUPTCY—See BILLS AND NOTES, 1, 2; PARTNERSHIP, 2; PROOF.

BANKS AND BANKING—See PARTNERSHIP, 1.

BEQUEST.

1. Gift of £10 to G. P. after the death of the life-tenant. G. P. was named as one executor and trustee, but did not accept. *Held*, that the usual presumption that the gift was made to him as executor was rebutted by its not being payable till after the death of the tenant for life, and that G. P. was entitled to the gift.—*In re Reeve's Trusts*, 4 Ch. D. 841.

2. Will appointing widow executrix, directing sale of real estate, and the widow to pay the debts. Bequest to the widow of "all my money, cattle, farming implements, &c; she paying my brother J. the sum of —, to him or his heirs; to my brother L. the sum of —, to him or his heirs." *Held*, that the widow was entitled to the whole, subject to the payment of the debts.—*Chapman v. Chapman*, 4 Ch. D. 800.

BILL OF LADING.

December 22. 1875, G. & Co., fruit merchants, bought a shipment of goods of the defendants, payment by acceptance at three months on delivery of the shipping documents. Jan. 1, 1876, G. & Co. applied to the plaintiff for an advance of £2,000. They were already indebted to the plaintiff, and he advanced the £2,000, on the promise of G. & Co., to cover their previous account with further security. Jan. 4, the bill of lading, bearing date Dec. 29, 1875, indorsed in blank by defendants, was handed to G. & Co., and

## DIGEST OF ENGLISH LAW REPORTS.

they accepted a draft for the price. The next day, they delivered the bill of lading to the plaintiff, according to their promise of Jan. 1 to give him security. Jan. 8, G. & Co. suspended; the ship arrived Feb. 3; the defendants tried to stop the goods *in transitu*; and plaintiff claimed them under the bill of lading. The jury expressly found that all the plaintiff's acts were done *bona fide*. *Held*, that he was entitled to the goods. The transfer of the bill of lading passed the property, even though the consideration therefor was past.—*Rodger v. Comptoir d'Escompte de Paris* (Law Rep. 2 P. C. 393), not approved; *Leask v. Scott Brothers*, 2 Q. B. D. 376.

See VENDOR AND PURCHASER.

## BILLS AND NOTES.

1. Where the drawer of a dishonoured bill has been adjudged bankrupt before dishonour, a notice sent to him, instead of to the trustee in bankruptcy, by the holder of the bill, is sufficient to enable the latter to prove in the bankruptcy. Such notice sent to the only post-office address of the drawer with which the holder was acquainted is sufficient, although it had ceased for months to be the proper address of the drawer.—*Ex parte Baker*. In *re Bellman*, 4 Ch. D. 795.

2. M. & Co. made advances to K. & C.; and drew bills of exchange on K. & C. for the amount, which the latter accepted. They also made assignments to M. & Co. of certain debts due them, intended as security for the same advances. The debtors had notice of the assignment. K. & C. went into liquidation, and a bank which had discounted the above bills proved for the full amount thereof. the trustee collected the assigned debts, under an agreement between him and K. & C. that this should be done without prejudice to the rights of M. & Co. The latter applied to have the proceeds of the debts paid over to them. *Held*, that M. & Co. must first take up the bills which they had discounted at the bank; and, if anything was found due them above the amount of the bills, the proceeds of the debts should be applied first in payment of that balance, and if any thing then remained, it should be applied in discharging M. & Co.'s liability under the bills of exchange.—*Ex parte Mann*. In *re Kattengell*, 5 Ch. D. 367.

See HUSBAND AND WIFE, 2.

BREACH OF PROMISE—See EVIDENCE, 2.

BROKER—See SALE, 1.

BURDEN OF PROOF—See EVIDENCE, 1.

BY-LAW—See RAILWAY, 1.

CARRIER—See COMMON CARRIER.

CAVEAT EMPTOR—See SALE, 2.

CODICIL—See WILL, 3.

COMMENDATION OF GOODS—See FALSE PRETENCES.

COMMON CARRIER—See RAILWAY, 2.

COMPENSATION—See ELECTION.

CONDITIONAL WILL—See WILL.

CONDITION AT SALE—See SALE, 4.

CONFLICT OF LAWS—See MARRIAGE.

CONSIDERATION—See BILL OF LADING.

## CONSTRUCTION.

1. A testator gave his residuary personal estate in trust to "all and every the children" of his uncle R., or their issue, in equal shares. He then devised to the trustees all his real estate in trust for A. for life, and after her death to sell the same, and hold the proceeds "upon trust for all and every the children of the said R., or their issue, in equal shares *per capita*." R. had six children, of whom four had died before the date of the will, each leaving issue. Two survived A., the tenant for life of the real estate. *Held*, that the fund should be divided into six parts; the two children surviving A. taking each one, and the several sets of issue of the four children dying before the date of the will each taking one.—*In re Sibley's Trusts*, 5 Ch. D. 494.

2. Testator directed his trustees that his daughter M. should have the income of all his property after attaining 21, for her separate use for her life; and that if she lived to become marriageable, and die leaving a "child or children," said income should be applied "to the support and maintenance of such child," if only one, or, if more, to such children, for life, "and in like manner to their children and children's children;" and, if the said M. died without being married, or left no child or children, or leaving children, "upon them or their families becoming extinct," then over. M. attained 21 without being married, and brought suit for immediate possession of the property on the ground that the limitations, except to her for life, were void for remoteness. *Held*, that she took an estate for life, and not an estate tail in possession. The court would not say what would become of the property on the death of her children if she had any.—*Hampton v. Holman*, 5 Ch. D. 183.

3. Cutting cocks' combs to fit them for cockfighting, or for winning prizes at exhibitions, *held*, to maintain an information that respondent did "cruelly ill-treat, abuse, or torture the birds," within 12 & 13 Vict. c. 92, § 2, as the operation

## DIGEST OF ENGLISH LAW REPORTS.

caused great pain.—*Murphy v. Manning et al.*, 2 Ex. D. 307.

## CONTRACT.

Contract to build school buildings to be finished by Dec. 25, in default of which the builders to forfeit £10 a week until the buildings were finished and delivered up. If the builders were prevented by bankruptcy, or any cause whatever, from completing the contract, the owners could terminate the contract, employ others to complete the work, and what had been paid the contractors should be held the full value of the buildings; and the material on the premises should be the property of the owners; and, finally, it was provided that, "in case this contract be not in all things duly performed by the said contractors, they shall pay to" the owners "the sum of £1,000, as and for liquidated damages." Before Dec. 25 the builders went into bankruptcy; the trustees in bankruptcy for a time carried on the work, and finally threw up the contract; and the owners had the work finished by another builder, but not till after Dec. 25. *Held*, that the £1,000 was in the nature of a penalty, and the owners could only prove for the actual damage they had sustained from the non-performance of the contract.—*In re Newman. Ex parte Capper*, 4 Ch. D. 724.

See COMPACT, 7; SALE, 3.

## COPYRIGHT.

If a dramatic piece has been first represented in a foreign country, the author has no exclusive right over the piece in England. Representation is publication within 7 Vict. c. 12, § 19.—*Boucicault v. Chatterton*, 5 Ch. D. 267.

See LIBEL AND SLANDER.

## CO-TRUSTEE.—See TRUSTEE.

## COVENANT.

Covenant by M., the lessee of a lot of land, in 1853, that he, his executors, administrators, or assigns, would not do anything upon the premises which might be an annoyance to the neighbourhood or to the lessees or tenants of the lessor, their heirs or assigns, or diminish the value of the adjacent property; nor erect, or permit to be erected, on the lot any building nearer than twenty feet to the road; nor erect any building, messuage, or erection whatsoever, without first obtaining the consent thereto of the lessors, their heirs or assigns. Subsequently, in 1858, H. took a lease of an adjoining lot by indenture containing similar covenants. In 1876, the assigns of M. began, with the approval of the lessor, to put up a building which would obstruct the windows of

H.'s assigns. On bill by H. to enjoin A. from erecting the building, and the lessor from allowing it, *held*, that B. was without remedy.—*Master v. Hansard*, 4 Ch. D. 718.

See LEASE, 2.

CREDITOR.—See PARTNERSHIP, 3.

CUSTODY OF DEEDS.—See TENANT FOR LIFE.

DEMAND.—See RAILWAY, 1.

## DEVISE.

1. Testator devised his freehold property at M., in trust for his two children. He never had any freehold property at M., but had some in R., to which M. adjoined, and in the parish of which M. was, but no mention of any property in R. was made in the will. *Held*, that the freehold in R. descended to the heir-at-law, as being undisposed of.—*Barber v. Wood*, 4 Ch. D. 885.

2. Under a general devise charged with debts or legacies, estates held in fee by the testator as trustee do not pass. *In re Bellis's Trusts*, 5 Ch. D. 504.

DISCRETION.—See TRUST, 2.

DOMESTIC RELATIONS.—See HUSBAND AND WIFE.

EASEMENT.—See COVENANT.

## ELECTION.

In 1848, P. & Son by deed covenanted to pay to trustees named therein a sum not exceeding £15,000 advanced and to be advanced to them by P.'s wife, in trust for such persons as she should by will or deed appoint, and, in default thereof, for her separate use for life. In 1851, by deed containing no power of revocation, she appointed that, after her and her husband's deaths, the funds should be held for the benefit of her two sons and her two daughters, in equal fourths; the daughters for life, remainder to their "children." In 1863, the advances had been more than £15,000; and the wife undertook by a third deed, also containing no power of revocation, to revoke the appointment of 1851, appointed the trust fund of 1848, and £20,000 more advanced to the firm by her, after the death of herself and her husband, to her children as before. The husband died in 1865. Subsequently, in 1865 and 1866, the wife undertook to make alterations in the appointments of 1843, also by deeds without power of revocation. In 1867, she made a will, undertaking to revoke all her appointments; gave her real estate to her son J., subject to a payment of £10,000 to her son W. She gave and appointed all her interest as it stood on the books of the firm of P. & Son, and certain railroad stock specified, and all

## DIGEST OF ENGLISH LAW REPORTS.

the residue of her personal estate, in trust to her two daughters for life, remainder to their "children or remoter issue." She had at this time a balance on the firm books in her favour; and the railroad stock, amounting to £10,000, had been purchased by the firm, by her direction, from a portion of the balance to her credit on said books. In 1873, the son J. died, leaving children and a will dated 1867, by which he left all the real estate to which he was or should be in any way entitled at his death to his oldest son. In 1874, the wife died, possessed of real estate of greater value than the amount she had appointed to her son J., in 1851, and of personal estate exceeding the £35,000 appointed in 1848 and 1863, as aforesaid; but she had only £10,000 in railroad stock. After her death, the £10,000 mentioned in her will was paid to W. The two daughters above named both had children. The action was begun to obtain a declaration of the rights of the various parties under the deeds and the will. *Held*, that all persons claiming under the will were bound to elect between the benefits conferred by the deeds and those conferred by the will; that J.'s estate must elect and make good to the disappointed legatees what was meant for them in the will; and that the real estate left to J. by his mother was liable for this amount exclusively. As to the rights created under the deed of 1863, if any, no decision would be made, as it might prejudice the interests of the children of the daughters thereunder.—*Pickersgill v Rodgers*, 5 Ch. D. 163.

ESTATE FOR LIFE.—See CONSTRUCTION, 2.

ESTATE TAIL.—See CONSTRUCTION, 2.

## EVIDENCE.

1. Action for possession of real estate. Plaintiff proved that W., the purchaser, died in 1868 seized in fee, without issue and intestate; that the descendants of W.'s paternal grandfather were all dead, and that plaintiff was heir-at-law of W.'s paternal grandmother. He put in evidence wills and other documents, in which no mention was made of anybody of nearer kin than plaintiff, except those proved to be dead. On W.'s death, an advertisement was put in the newspapers for his heir-at-law; but nobody able to prove anything came forward, except the coheirresses of the mother of W., to whom the defendants had attorned. The defendants showed, by wills and other documents, that the father of W.'s paternal grandfather was J. W.; that he had another son, N., alive in 1755; and he had a sister, Mrs. M., a widow, and alive in

1755; and that the wife of J. W. was S. B. The defendants claimed that the plaintiff should give some evidence as to the extinction of these lines of descent which were preferable to his own. *Held*, that there was evidence for the jury to find for the plaintiff.—*Greaves v Greenwood et al.*, 2 Ex. D. 289.

2. By 32 & 33 Vict. c. 68, § 2, the parties to a suit for breach of promise of marriage may give evidence; but no plaintiff shall recover, "unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Plaintiff swore that the defendant, by whom she was with child, had promised to marry her, and he denied it. Her sister testified that she upbraided him for his conduct; and he said, "he would marry her, and give her anything," but he must not be exposed. After plaintiff was brought to bed, the sister said she overheard him offer her money to go away, and the plaintiff said to him, "You always promised to marry me, and you don't keep your word." The jury found for the plaintiff for £100. *Held*, that there was not sufficient evidence, according to the statute, to support the plaintiff's case.—*Bessela v Stern*, 2 C. P. D. 265.

3. Indictment for obtaining money under false pretences. The prisoner was timekeeper, and C. was paying clerk, to a colliery company. Every fortnight the prisoner gave C. a list of the days worked by each man; and C. entered them in a time-book, together with the amount due each one. On pay-day, the prisoner had to read from the time-book the number of days so entered, and C. paid them off. While the prisoner read, C. looked on the book also. *Held*, that C. might refresh his memory as to the sums paid by him to the workmen, by referring to the entries in the time-book.—*The Queen v. Langton*, 2 Q. B. D. 296.

4. Gift of residue in trust to A. for life, remainder for all or any of her children who should attain twenty-one or marry. A. died in 1876, having had four children. One child, a minor, petitioned to have herself declared the only person entitled, on the ground that the other children of A. were illegitimate. The evidence of A.'s husband that, after the birth of the petitioner, A. left him, and that they had never since been or lived together as husband and wife, but that A. had lived with another man, was admitted; and the petitioner was declared solely entitled.—*In re Yearwood's Trusts*, 5 Ch. D. 545.

See NEGLIGENCE, 2; WILL, 5, 7.

## DIGEST OF ENGLISH LAW REPORTS.

**EXECUTORS AND ADMINISTRATORS.**—See WILL, 1. **FACTOR.**

H., a commission merchant and tobacco dealer, sold, through his agent, K., to the plaintiff, a lot of tobacco lying in bond at the dock. The tobacco, according to the usage practised between the parties, remained at the dock uncleared in the name of H.; but the transaction was entered in H.'s books as a sale; and Dec. 3, 1875, an invoice of sale by H. to the plaintiff was sent to the latter, and, Dec. 31, he paid for the tobacco in full. The usage had been in such cases for the plaintiff to receive the tobacco in instalments, as he wished it to manufacture, in which case he would send dock dues and charges for the portion he wanted, and that portion would be discharged and forwarded by H.; but in this case none of the lot had been sent, and March 9, 1876, H. absconded, and March, 15, was adjudged bankrupt. Meantime, Jan. 26, 1876, he had pledged the tobacco to the defendants, and given them the dock warrants, and transferred the tobacco into their name. He represented it to be his property, and they had no knowledge that the plaintiff claimed it. The court had power to draw inferences of fact. *Held*, that the plaintiff was entitled to the tobacco; and that H. had no authority to sell or pledge the tobacco while lying in the dock in his name, but only to clear and forward it to the plaintiff.—*Johnson v. The Crédit Lyonnais*, 2 C. P. D. 224.

**FALSE PRETENCES.**

Indictment for obtaining money under false pretences. Prisoner was a pedler, and induced a woman to buy some packages, which he called good tea, but which turned out to be three-quarters foreign and deleterious substances. The jury found that he knew the character of the stuff, and that he falsely pretended it was good, with intent to defraud. *Held*, that the conviction must stand.—*The Queen v. Foster*, 2 Q. B. D. 301.

**FERRY.**

A ferry cannot maintain an action for damage to its traffic against a railroad or bridge company which has provided a foot or other bridge, and thus drawn off travel from the ferry. *Reg. v. Cambrian Railway Co.* (L. R. 6 Q. B. 422) overruled.—*Hopkins et al. v. The Great Northern Railway Co.*, 2 Q. B. D. 224.

**FRAUDS, STATUTES OF.** See STATUTE OF FRAUDS.**GENERAL AVERAGE.**

A captain burnt some spars and a part of the cargo, to keep the donkey engine running to pump the ship in bad weather, and thus saved her. The ship sailed

properly equipped with coals; but they ran short, owing to unexpected bad weather. *Held*, a case for general average. *Robinson v. Price*, 2 Q. B. D. 295; s. c. 2 Q. B. D. 91, 11 Am. Law Rev. 695.

**GIFT TO EXECUTOR.**—See BEQUEST, 1.**HUSBAND AND WIFE.**

1. A wife cannot commit larceny from her husband, no matter whether she has been guilty of adultery or not.—*The Queen v. Kenny*, 2 Q. B. D. 307.

2. The wife of G. received a legacy, given her for her separate use, in the form of a banker's draft, to her order for the amount. She indorsed it to her husband; he indorsed it in blank, and deposited it to his own account. He died a few days after. *Held*, that the wife was entitled to the amount of the draft.—*Green v. Carlill*, 4 Ch. D. 882.

3. W. sold to T. a claim, which he had by right of his wife, to certain engravings, once the property of Turner, the artist, who died intestate in respect of them. W., T., and W's wife died in the order named, and W's executor's brought suit against T's representatives to set aside the sale. *Held*, on the preliminary objection that the wife's representative was the party who should have sued, that the suit was properly brought by W's executors.—*Widgey v. Tepper*, 5 Ch. D. 516.

See EVIDENCE, 4.

**ILLEGITIMACY.**—See EVIDENCE, 4.**INSURANCE.**

The ship F. was insured while lying in the docks under repair, for "the space of twelve calendar months," from Jan. 24, 1872, to Jan. 23, 1873. The clause as to time was written in upon a printed blank, designed for a voyage policy; and some of the words, such as "present voyage," inconsistent with the tenor of a time policy, had not been erased. The vessel was found to have been unseaworthy by the jury, though without the knowledge of the owner. *Held*, that the policy was a pure time policy, notwithstanding the printed words not erased; and the court reiterated the rule laid down in *Gibson v. Small* (4 H. L. C. 353), and repeated in subsequent cases, that in time policies there is no implied warranty of seaworthiness. The insured fails to recover, only when he had knowingly sent the ship to sea in an unseaworthy condition.—*Dudgeon v. Pembroke*, 2 App. Cas. 284.

**JOINT WILL.**—See WILL, 6.**JURY.**—See LIBEL AND SLANDER.**LANDLORD AND TENANT.**

Defendant hired plaintiff's furnished house from May 7. She went to the house

## DIGEST OF ENGLISH LAW REPORTS.

on that day, and had her horses put in the stable; but she perceived a bad smell, left the house, and removed her horses at once. The house was found to be untenable from bad drainage, and the plaintiff put it in order, and tendered it to defendant, May 20. She refused to accept it. *Held*, that she was not liable. When a furnished house is let, there is an implied condition that it is tenable at the beginning of the term. If it prove otherwise, the tenant may throw up the bargain.—*Wilson v. Finch Hatton*, 2 Ex. D. 336.

See LEASE, 1, 2.

LARCENY.—See HUSBAND AND WIFE, 1.

## LEASE.

1. Lease not under seal for three years, with right in the tenant to remain on three and a half years more at the same rate, *held* to be within the Statute of Frauds, and of 8 & 9 Vict. c. 106, s. 3.—*Hand v. Hall*, 2 Ex. D. 318.

2. B. conveyed an eating-house in lease, and covenanted that he would not let any house in that street "for the purpose of an eating-house;" but it was provided that the covenant should not bind B's heirs or assigns. He then let another house in the street, and the lessee covenanted with him that he would not carry on any business there without a license from B. Both leases were assigned, and the assignee of the first brought action against the assignee of the second and B., to restrain them, respectively, from carrying on and allowing to be carried on the business of an eating-house. *Held*, that the covenant was not broken.—*Kemp v. Bird*, 5 Ch. D. 549.

See LANDLORD AND TENANT; STATUTE OF LIMITATIONS, 2.

LEGACY.—See DEVISE, 1.

LEX DOMICILII.—See MARRIAGE.

LEX LOCI CONTRACTUS.—See MARRIAGE.

## LIBEL AND SLANDER.

Defendant was agent for C. & Co. and M. & Co., proprietors of certain musical and dramatic copyrights, and received the fees for their representation in theatres and concert-rooms. The plaintiffs were singers, and put the following advertisement in the *Era* newspaper: "The Sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co., and others, for their kind, unhesitating permission to sing any *morceaux* from their musical publications." Seeing this, defendant wrote to two concert-hall proprietors, where the plaintiffs were singing, to the effect that the said advertisement was calculated to mislead

them into incurring penalties under the Copyright Act, as the said C. & Co. and M. & Co. were not authorized to grant such permission; and he had been assured by them that they had not given such permission, and that the said proprietors had a poor opinion of concert-hall performances; and he added that he knew the lady advertisers had no such intention of so misleading them. *Held*, on a motion to set aside a nonsuit, that the letters contained matter which might be libellous; and that the question should have been left to the jury.—*Hart et al. v. Wall*, 2 C. P. D. 146.

LIMITATIONS, STATUTE OF.—See STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES.—See CONTRACT.

LOAN.—See PARTNERSHIP, 3.

MANSLAUGHTER.—See MURDER.

MARINE INSURANCE.—See INSURANCE.

MARKET.—See SALE, 2.

## MARRIAGE.

B. and S., Portuguese subjects, and first cousins, went through the form of marriage, in 1864, in London, in accordance with the requirements of English law. Subsequently they both returned to Lisbon, and lived there still, and have never lived together as husband and wife. By the law of Portugal, marriages between first cousins are null and void. A petition by the wife, S., for nullity of this marriage was refused.—*Sottomayor*, otherwise *De Barros v. De Barros*, 2 P. D. 81.

## MASTER AND SERVANT.

1. The defendants employed the plaintiff with other workmen, and also a steam-engine, with an engineer, in sinking a shaft in their colliery. When the work was partly done, they employed W. under a verbal contract to finish it. W. was to employ and pay the plaintiff and the other workmen. The engine and engineer were under his control; but the engineer's wages were to be paid by the defendants. The plaintiff was injured through the negligence of the engineer. *Held*, on appeal, that the defendants were not liable. *Rourke v. The White Moss Colliery Co.*, 2 C. P. D. 205; s. c. 1 C. P. D. 556; 11 Am. Law Rev. 286.

2. Defendant was proprietor of a cab, which was run over the plaintiff while being furiously driven by the cabman. The contract between the proprietor and the cabman was, that the cabman should have the cab each day for as long as he chose, and pay therefor 16s. *per diem*. If he took more, he pocketed the surplus; if less, he made up the deficit. When the accident happened, the cabman had returned with

## DIGEST OF ENGLISH LAW REPORTS.

the cab for the day; but, on approaching the stables, thought he would drive by a quarter of a mile to a tobacconist's and get some snuff. On his return, being drunk, he ran over the plaintiff. *Held*, that the defendant was liable.—*Venables v. Smith*, 2 Q. B. D. 279.

See NEGLIGENCE, 1.

## MEASURE OF DAMAGES.

A ship, owing to being unseaworthy, was one hundred and twenty-seven days on a voyage, usually made in sixty-five. In consequence of the delay, the cargo had to be sold at a lower rate, the market having fallen, and the assignee brought suit for damages. *Held*, reversing the judgment of the Admiralty Division, that he could not recover for loss of profit from a reduced market.—*The Parana*, 2 P. D. 118; a. c. 1 P. D. 452; 11 Am. Law Rev. 691.

## MORTGAGE.

Dec. 1, 1874, M., the owner of a vessel, mortgaged it to the plaintiffs for £7,500. Jan. 4, 1875, defendants, in ignorance of the mortgage, advanced M. £3,000 on security of a cargo shipped by M. on nominal freight of 1s. per ton. Feb. 2, 1875, M. again mortgaged the vessel to the plaintiffs for £4,000. Feb. 19, M. and the defendants sold the cargo to J., on terms of freight being paid, at 55s. per ton. Feb. 22, the defendants advanced £9,000 more to M. Feb. 26, M. assigned to defendants the freight at 55s. per ton, as security for their advances. On the arrival of the vessel, the plaintiffs took possession. The defendants acquired J.'s right. *Held*, on appeal, reversing the decision of Common Pleas, that the plaintiffs were entitled to 1s. freight, and not 55s.—*Keith et al v. Burrows et al*, 2 C. P. D. 163; a. c. 1 C. P. D. 722; 11 Am. Law Rev. 508.

## MURDER.

A man indicted as an accessory after the fact to murder, may be convicted as an accessory after the fact to manslaughter.—*The Queen v. Richards*, 2 Q. B. D. 311.

## NEGLECTANCE.

1. The defendant was a coal merchant; in delivering coals to his customer, one of his men left the coal grate in the sidewalk open, and the female plaintiff, without negligence on her part, fell in and sprained her ankle. It was the sole duty of the servant to deliver the coals for defendant to his customers. It was objected, on the strength of *Pickard v. Smith* (10 C. B. n. s. 470), that the customer, as occupier of the premises, was responsible for the grate's being open. *Held*, that defendant was liable.—*Whiteley and Wife v. Pepper*, 2 Q. B. D. 276.

2. Plaintiff was a third-class passenger on defendant's underground railway; and at the G. station three persons got in, and stood up, the seats in the compartment being already full. The plaintiff objected to their getting in; but there was no evidence that defendants' servants were aware of it, and there was no evidence tending to show that there was no guard or porter present at the G. station. At the next station the door was opened and shut; but there was no evidence by whom. Just as the train started, there was a rush by persons trying to get in; the door was thrown open; the plaintiff partly rose to keep the people out; the train started; the plaintiff was pitched forward, and caught with his hand by the door-hinge to save himself; a porter pushed the people away, just as the train was entering the tunnel, and slammed the door to, and thereby plaintiff's thumb was caught and injured. *Held*, by a divided court, that, on these facts, there was evidence from which the jury might find negligence on part of defendants.—*Jackson v. The Metropolitan Railway Co.*, 2 C. P. D. 125; s. c. Law Rep. 10 C. P. 49.

See MASTER AND SERVANT, 1, 2.

NOTICE—See BILLS AND NOTES, 1.

NOVATION—See PARTNERSHIP, 1.

## NUISANCE.

A person having an artificial drain under his house is bound so to keep it as not to do injury to his neighbour, although he has been guilty of no negligence, and the existence of the drain was not in any way known to him. *Humphries v. Cousins*, 2 C. P. D. 239.

PAROL EVIDENCE—See WILL, 5, 7.

## PARTNERSHIP.

1. Prior to April 16, 1872, H. & E. were partners under the firm of H. & Co., and by the name of the "L. M. Bank." April 16, 1872, W. and J. H. were admitted partners; April 29, 1872, H. died; and May 23, 1874, E. died. The business was, during all this time, carried on under the same firm, name and designation, and the customers of the same knew of the various changes. In December, 1875, the firm went into liquidation. The business of the bank was to receive money on deposit, for which they gave notes signed "H. & Co., L. M. Bank;" and, when a customer changed his deposit, his note was given up, and another made out to him. The claims in this action were by depositors against the estate of H. Some of the claimants had left their deposits unchanged from H.'s death, and some had changed them; and all had received interest from the firm up to



## DIGEST OF ENGLISH LAW REPORTS.

suspension, and a dividend in the settlement of the firm's affairs, "for money lent and advanced" to the bankrupts. *Held*, that they had no claim against the estate of H., but that there had been a complete novation,—a new liability had been substituted for the old.—*Bilborough v. Holmes*, 5 Ch. D. 255.

2. J. gave a guaranty for £1,000 to a bank, in favour of A. & Co., of which firm he told the bank he was a member, though he did not wish the fact to be known. A subsequently went into bankruptcy as "A. & Co.;" and the bank filed proof of a claim against the firm, and brought a suit at law against J., as being a partner. J. filed a petition in equity to restrain, and denied the partnership. The claim against J. was settled; and the bank gave up the guaranty to J. indorsed in payment and discharge thereof, and "also of all claims against J. in reference to us in connection with A. & Co." *Held*, that the indorsement did not preclude the bank from proving against A. & Co. in bankruptcy, though J. must be held to have been a partner.—*Ex parte Good*. In *re Armitage*, 5 Ch. D. 46.

3. By deed of partnership, dated Oct. 10, 1868, B. & H. agreed to become partners on the terms therein mentioned, the partnership to continue fourteen years under the name of B. & Co. The capital was to be £30,000, of which £15,000 was the good-will of the business. B. put in £1,000, and H. £4,000, and the remaining £10,000 was to be raised "by way of loan" under Bovill's Act, 28 and 29 Vict. c. 86, "in sums of £500, from persons willing to advance the same for the purpose of the said partnership; and the said capital shall be divided into sixty equal parts of £500 each," of which B. was to be the owner of seventeen, and H. of twenty-three; "and the remaining twenty equal parts or shares shall be considered as appropriated to or for the benefit of the person or persons so advancing money by way of loan, as aforesaid, on the proportion on which the same shall be advanced by them respectively." The capital was not to be drawn out of the business during the continuance of the partnership. Then followed a clause that the partners were to conduct the business to the best of their ability. The profits were to be paid out each year to persons holding £500 shares, according to the number thereof; and, on the expiration or earlier termination of the partnership, the parties thus making "advances by way of loan" were to be repaid the same, less what might have been overpaid them by way of profits. The other provisions

usual to partnership articles were contained in these. About the same time, a deed was made between one D. and the partners B. and H., reciting the partnership papers, and that D. had agreed to advance them £2,500 under Bovill's Act, by way of loan, to carry on their business, which B. and H. agreed to repay within six months after the termination of the partnership; that B. and H. should observe all the provisions of the partnership articles, and the latter should be always open to D.'s inspection; that B. and H. would make out yearly accounts, and pay D. either five-sixtieths of the profits, or such a proportion of all the profits as D.'s advance bore to the whole capital; that, if either partner became bankrupt, the other should pay D. his advance and profits due him in full; that, within six months after the termination of the partnership, said £2,500 should be repaid "out of the assets" of the firm; and that if, at the end of the business, the amounts paid D. as profits turned out to exceed the whole profits of the business, D. should refund the excess, not exceeding £2,500. There followed an arbitration clause. Bovill's Act provides that "the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not of itself constitute the lender a partner." *Held*, that the act was declaratory of the common law; and that, at common law, D. was liable, as a partner, for the whole of the partnership debts. *Pooley v. Driver*, 5 Ch. D. 458.

PLEADING AND PRACTICE—See MURDER; RAILWAY, 1.

POST-OFFICE ADDRESS—See BILLS AND NOTES, 1.

PRECATORY TRUST—See TRUST, 3.

PRESCRIPTION.

A sea-wall had been maintained, time out of mind, along a creek on which plaintiff and defendant each had land. It was necessary now and then to put fresh material on the top of the wall, to keep it up to a proper height. Defendant neglected to "top" his wall, and, in consequence, the sea flowed over and injured not only his own land, but also that of plaintiff. *Held*, that there was no evidence of a prescriptive liability of any one abuttor to maintain his wall for the protection of the others; and the common law created no such liability on the frontagers.—*Hudson v. Tabor*, 11 Q. B. D. 290; s. c. 1 Q. B. D. 225.

PRIMA FACIE PROOF—See EVIDENCE, 1.

PRINCIPAL AND AGENT—See FACTOR.

## DIGEST OF ENGLISH LAW REPORTS.

PROBATE—See WILL, 3, 7.

## PROOF OF CLAIM.

Where a widow was entitled to an annuity, during life or widowhood, out of property bequeathed to her sons, and the sons had given bonds for the payment of the same, and then went into bankruptcy, *held*, that the value of her claim was capable of being fixed and proved through the report of an actuary.—*Ex parte Blakemore*. In re Blakemore, 5 Ch. D. 372.

## RAILWAY.

1. A person was informed against under 8 & 9 Vict. c. 20, § 145, for not showing his ticket on a railway company's carriage, for which offence a by-law of the company required him "to pay the fare from the station whence the train originally started to the end of his journey." *Held*, that to recover under this by-law, there must have been a demand of the specific sum due thereunder in this particular case complained of.—*Brown v. The Great Eastern Railway Co.*, 2 Q. B. D. 406.

2. By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), § 2, railway companies are forbidden to "give any undue or unreasonable preference or advantage to, or in favour of, any particular person or company," in the matter of carrying and forwarding traffic. Plaintiff had a brewery at B., where there were three other breweries. The latter were connected with the M. Railway; plaintiff was not. In order to get some of the freight from the three breweries for themselves away from the M. railway, the defendant company carried their goods from the breweries to the freight depot, free of charge, and still made a profit on the transportation. They made a charge to the plaintiff for the same service. *Held*, that this was "undue preference" within the Act, and the plaintiff could recover an amount equal to the cost of carting his goods to the defendant's depot.—*Evershed v. The London & Northwestern Railway Co.*, 2 Q. B. D. 254.

See COMPANY, 1, 2; FERRY; NEGLIGENCE, 2.

## RAPE.

The prisoner was consulted by the prosecutrix, a girl of nineteen, with her mother, for fits. He said the difficulty was, that "Nature's string wanted breaking." Without knowing what that meant, the girl consented to his remedy; and, under pretence of performing a surgical operation, he had carnal intercourse with her, she being wilfully and fraudulently induced to believe that it was merely medical treatment. *Held*, that he was

guilty of rape. The judges all intimated a wish that the point decided in *Reg. v. Barrow* (Law Rep. 1 C. C. 156) might be reconsidered.—*The Queen v. Flattery*, 2 Q. B. D. 410.

REMOTENESS.—See CONSTRUCTION, 2.

REQUEST.—See TRUST, 3; WILL, 1

REVOCATION.—See ELECTION; WILL, 6.

## SALE.

1. March 3, 1876, D., a broker, bought for B. & Co., his undisclosed principals, certain dry goods lying at the K. Docks consigned to C., payment to be made in fourteen days. C. signed a delivery order to the Docks' superintendent to the order of D. D. indorsed it to B. & Co. B. & Co. indorsed it to plaintiffs, as security for advances. March 18, being prompt day, plaintiffs sent the delivery order to the Docks' office, with the request to hold the order, and have warrants made out as soon as possible. He was told the goods would be ready for delivery on the 20th; and a clerk was sent to the Docks' warrant office with the order, where he arrived at 3 p. m. Meantime D., hearing that B. & Co. had suspended, paid C. for the goods, sent to the Docks' warrant office, and obtained a warrant for the goods in the name of C. before the other order arrived, had C. indorse the warrant to him, and give him a second delivery order. The Docks Company returned the first delivery order unexecuted, and plaintiffs brought suit against C., D., and the company. It is a usage of the London Dry Goods Market, that a broker who does not disclose his principal is liable as surety for the latter's default. *Held*, that the unpaid vendor's lien had passed to D., who was surety for R. & Co., and the plaintiffs gained no title.—*Imperial Bank v. London & St. Katharines Docks Co.*, 5 Ch. D. 195.

2. A man brought in pigs from his infected herd, out of which many had died, and had them sold, expressly stating that they were to be taken with all faults. *Held*, that at common law, as well as by the Contagious Diseases (Animals) Act, 1869, he was liable in damages to the buyer, on whose hands the pigs died.—*Ward v. Hobbs*, 2 Q. B. D. 331.

3. N. undertook to sell to E. three farms. The agreement to purchase was signed Sept. 3, 1873, and payment was to be made and possession given Sept. 29 following. In case the purchase was not completed on that day, the purchaser was to pay interest to such reasonable date as might be agreed upon. On that day it turned out that the seller had not a legal

## DIGEST OF ENGLISH LAW REPORTS.

title to the property, and the purchaser refused to accept the same, and afterwards, when the seller offered him a clear title, persisted in his refusal. *Held*, that time was of the essence of the contract, and therefore the refusal was justified.—*Noble v. Edwards*, 5 Ch. D. 378.

4. The defendants were auctioneers, and issued a list headed: "Great Western Railway Co., catalogue of unclaimed property, which will be sold by auction by Messrs. H. & E., on Tuesday, Nov. 7, or following day. By order of the directors of the above company," &c. There were the following conditions also printed on the same document: "The lots to be cleared away within three days after the sale, at the purchaser's expense. If any deficiency arise, or from any cause the auctioneer shall be unable to deliver any lot . . . then, in such case, the purchaser shall accept compensation. Upon failure of complying with the above conditions, the money deposited in part payment shall be forfeited. All lots unclaimed within the time aforesaid shall be resold by public or private sale, without further notice, and the deficiency made good by the defaulter." Plaintiff bought a lot on Wednesday, and paid his deposit, but did not go for the goods till Monday, when he was told the lot had been delivered to another party. A witness said that he saw the goods Saturday morning in process of being delivered. Defendants claimed that they were not liable, on the ground that they were the agents merely of the railway company, and, also, on the ground that plaintiff was bound to take the goods within three days, that being a condition precedent. *Held*, that there was evidence of a personal contract on the part of the defendants, and that the condition to remove the goods was not a condition precedent. *Woolfe v. Horn*, 2 Q. B. D. 355.

SEA-WALL.—See PRESCRIPTION.

SEAWORTHINESS.—See INSURANCE.

SLANDER.—See LIBEL AND SLANDER.

SOLICITOR AND CLIENT.—See ATTORNEY AND CLIENT.

STATUTE.—See CONSTRUCTION, 3; EVIDENCE, 2.

STATUTE OF FRAUDS.—See LEASE.

STATUTE OF LIMITATIONS.

1. Demurter that the following note did not revive a debt otherwise barred by the statute: "Your note . . . forwarded to me here. I return to S. about Easter. If you send me there the particulars of your account, with vouchers, I shall have it examined, and check sent to you for the amount due; but you must be under

some great mistake in supposing that the amount due to you is any thing like the sum you now claim." Demurrer overruled.—*Skeet v. Lindsay*, 2 Ex. D. 314.

2. In 1783, a lease was granted for ninety-nine years, and there was enjoyment under the lease until 1876, when an action was brought for possession, on the ground that the lease was void under 13 Eliz. c. 10. Demurrer that the claim was barred by the Statute of Limitations. *Held*, that the lease was voidable, not void, and that consequently the statute did not begin to run till the action was brought.—*Governors of Magdalen Hospital v. Knotts*, 5 Ch. D. 175.

See COMPANY, 2.

STOPPAGE IN TRANSITU.—See BILL OF LADING; VENDOR AND PURCHASER; VENDOR'S LIEN.

SUBSTITUTION.—See CONSTRUCTION, 1.

TENANT FOR LIFE.

A tenant for life was allowed by the court to retain possession of the title-deeds, as against the remainder-man, who applied to have them deposited in court.—*Leathes v. Leathes*, 5 Ch. D. 221.

TIME.—See CONTRACT; SALE, 3.

TIME POLICY.—See INSURANCE.

TRUST.

1. In 1807, a testator left a will, with the following clause: "I appoint my executor, Charles E., my youngest brother, to be trustee for the following legacies," naming them: "Considering that money will be more essential to my brother Samuel than a distant possession of land I bequeath to Samuel during his natural life the interest of £3,000; and, after his death, to his eldest son, James, by his last wife, Margaret J., or M. or E., till he attains twenty-one, and then to obtain the principal. I order that my youngest brother, Charles E., shall be liable to all my lawful debts of every description, and pay them as soon as he can; and also pay my legacies when regularly due; . . . and, to enable him to do this, I bequeath unconditionally to him all my estates . . . in Armagh. I also bequeath to him . . . all my estates . . . in Louth or elsewhere." The legacy of £3,000 to Samuel was not paid; but, in 1833, his son accepted £300 in settlement, on the ground, urged upon him by Charles's representative, that he was entitled to nothing, as being illegitimate. In 1872, a bill was filed by parties interested under his claim, asking that the composition of 1833 be set aside as unconscionable, and the £3,000, with interest, be declared well charged upon the estates and for general relief. *Held*,

## DIGEST OF ENGLISH LAW REPORTS.

that the agreement of 1833 was null and void,—all the parties having plainly proceeded upon the assumption that the question of the illegitimacy of Samuel's son decided his right; whereas, on the words of the will, that had nothing to do with it; that there was created a trust in respect of the £3,000 on the estates in Armagh bequeathed to Charles (*quere* as to the Louth estate, that point not having been disputed), and consequently the Statute of Limitations did not apply. Interest on the legacy was, however, allowed for six years only, on the ground that no direct proceedings had been taken to enforce the claim before 1872.—*Thomson v. Eastwood*, 2 App. Cas. 215.

2. A testator devised his property to trustees upon trust, *inter alia*, that they should, "in their discretion and of their uncontrollable authority, pay and apply the whole or such portion only of the annual income . . . as they shall think expedient to or for the clothing, board, &c., for the personal and peculiar benefit and comfort of my dear wife." One of the trustees was residuary legatee. The wife was an insane person, and had property in fee in her own right. *Held*, that the court would not make a decree that the trustees "should exercise such discretion by paying and applying such portion only of the income of the estate of the testator as with the income from other sources will make up" the amount needed for the wife's support, &c. The court would not interfere with the exercise of the discretion given to the trustees by the will.—*Gisborne et al. v. Gisborne et al.*, 2 App. Cas. 300.

3. Residuary bequest to trustees to hold "in trust for such of my nieces, M. and N., as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." *Held*, that M. and N. took absolutely for their own benefit.—*Stead v. Millor*, 5 Ch. D. 225.

See *DEVISE*, 2.

## TRUSTEES.

Trustees advanced money to A., a builder, on security of land purchased by A. of B., the defendant and one of the trustees, and which A. had built upon. The money was used partly to pay for the land, and partly to repay other sums which A. owed B. The plaintiff, the other trustee, knew that A. and B. had had business relations. A. went into bankruptcy, and the plaintiff filed a bill against B., his co-trustee, alleging that the security was insufficient, and asking that the property be sold, and that the

defendant be held to make up the deficiency. Refused.—*Butler v. Butler*, 5 Ch. D. 554.

USAGE.—See *VENDOR'S LIEN*.

## VENDOR AND PURCHASER.

Feb. 10, 1876. L., a merchant, and W., a manufacturer, made an agreement under which W. was to supply L. with goods from time to time, and W. should draw upon L. bills of exchange for the invoice price, which L. should accept, L. having regularly a credit of £5,000. L. was to ship the goods to R. & Co., Shanghai, for sale on his account; sending the bills of lading by post, and made out to R. & Co.'s order. W. was to have a lien on the bills of lading, and the goods in transit to Shanghai, or in anybody's hands as well as upon the proceeds of the goods purchased therewith in the hands of the consignees, or in transit home-wards; such lien not to be general, but to be confined to the particular shipment, and cease when the bills for such shipment had been paid by L. L. was to insure primarily for the benefit of W., as mortgagee or pledgee. L. promised W. to give R. & Co. notice of this agreement; but they had no notice of it. Under the agreement, L. ordered goods of W.; they were packed by W.'s packer, and marked "Shanghai." W. sent the invoice to L., headed "L., bought of W." L. wrote the packer to send the goods to the G., a Shanghai vessel loading at the dock. W. paid the freight to the dock, and the packer advised L. that he had sent the goods thither, at L.'s disposal. W. drew on L. at six months, for the amount of the bill of the goods; and L. accepted the bill. The carriers who took the goods to the dock notified L. that they had arrived at their warehouse, and would be sent to the G.; and they were shipped on board that vessel, and the bills of lading made out to L.'s order. He did not, however, pay the freight, and the bills of lading remained in the ship-owners' hands. Subsequently, April 5, 1876, L. suspended payment. April 8, the G. sailed. April 12, L. filed his petition in bankruptcy, and, May 20, was adjudged bankrupt. The trustee in bankruptcy and W. each demanded the bills of lading before the ship reached Shanghai; and it was agreed that the goods should be sold, and the proceeds held to abide the decision of the court. *Held*, that W. had a right of stoppage *in transitu* until the goods reached Shanghai; and that, by demanding the bills of lading, he had exercised his right, and could have the bill of exchange accepted by L. paid out of the proceeds of

## DIGEST OF ENGLISH LAW REPORTS.

sale of the goods.—*Ex parte Watson. In re Love*, 5 Ch. D. 35.

See BILL OF LADING; SALE, 3.

## VENDOR'S LIEN.

The P. Company, defendants, manufacturers of steel rails, made a contract for rails with S. & Co., to furnish them a certain quantity at stated times, delivered at Liverpool on board ships; payment to be made three-fifths net cash, and two-fifths by buyer's acceptance, at four months, as each five hundred tons of rails were ready for shipment. The warrant signed by the defendant company for the delivery of the rails contained the phrase, "Iron deliverable (f. o. b.) to S. & Co., or to their assigns by indorsement hereon;" and it was shown to be the usage of the iron trade that such warrants were considered to pass the goods to the holder hereof free from vendor's lien. Several warrants in this form were sent, with invoice and drafts, to S. & Co., as the instalments of rails were finished, and the rails stored at the company's works. S. & Co. pledged the warrants to the plaintiff banking company for advances; and, before the contract was completed, and while some of the goods were still at the works, and some had been sent to Liverpool on the order of S. & Co., and were in the railway company's warehouse, S. & Co. suspended. *Held*, that under the above usage, the plaintiffs were entitled to the goods at the works, and were, moreover, entitled to those in the warehouse, as being no longer in transit.—*Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, 5 Ch. D. 205.

See BILL OF LADING.

WARRANTY.—See INSURANCE.

## WILL.

1. Testatrix made a will disposing of all her property. In 1860, she made another, making some changes in the bequests as they stood in the first document. The second will contained no residuary clause, and made no allusion to the previous will; but it declared that "this is the last will . . . of me." *Held*, that the first will must be considered revoked: the second alone admitted to probate.—*Dempsey v. Lawson*, 2 P. D. 98.

2. Clause: "I appoint my sister . . . my executrix, only requesting that my nephews, F. & J., 'will kindly act for or with this dear sister.'" *Held*, that F. and J. were duly named executors with the sister of the testatrix.—*In the goods of Brown*, 2 P. D. 110.

3. Testatrix wished to revive a will and codicil dated respectively Jan. 26, and Feb. 21, 1876, and which had been sub-

sequently revoked. Her solicitor made copies of them, and had the two documents re-executed Jan. 18, 1877. He neglected to change the reference to the date of the will made in the codicil, and the codicil read, "my last will dated Jan. 26, 1876." *Held*, that the will and codicil should be admitted to probate.—*In the goods of Ince*, 2 P. D. 111.

4. Clause in will: "I hereby appoint one of my sisters my sole executrix." Testator had three sisters living at the date of the will; but only one survived him. The court refused to grant probate to her on the ground of uncertainty.—*In the goods of Blackwell*, 2 P. D. 72.

5. Testator, living in Brighton, left a will appointing twelve executors thereof, one of whom he described as "Percival —, of Brighton, the father." There was evidence that testator had an intimate friend in Brighton, named William Percival Boxall; that testator was accustomed to call him Percival, and had appointed him executor in his previous will; that Boxall had a son named Percival, well known to the testator; and that testator knew no other person named Percival. This evidence was admitted to determine who was meant.—*In the Goods of De Rosaz*, 2 P. D. 66.

6. He made a will dated March 15, 1864, giving his property to his wife. Oct. 12, 1874, he and his wife made a joint will, "in case we should be called out of this world at one and the same time, and by one and the same accident." There was a clause revoking all previous wills. He died Dec. 31, 1876; his wife surviving. *Held*, that the joint will was made in view of an event which never happened, and hence it had become and was of no effect. The other will was good.—*In the Goods of Hugo*, 2 P. D. 73.

7. Testator used a blank lithographed form for a will to give property absolutely to children after the life-estate of the widow. The lithographed words giving to the children were marked out, and the words, "to my only son, H.," written in. No note was made on any part of the will to these alterations, and the attesting witness (one witness had died) knew nothing about it. Testator left five children by a former wife, and the said son H. by a wife living. Testator has said to the trustee named in the will that he meant to provide for his son H.; and this evidence was admitted, and the will admitted to probate.—*Dench v. Dench*, 2 P. D. 60.

See BEQUEST, 1, 2; DEVISE, 1, 2; ELECTION; TRUST, 1, 2, 3.

## WORDS.

"Money, Cattle, Farming Implements, &c."—  
See BEQUEST, 2.

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

"All and Every the Children of our Issue."—See CONSTRUCTION, 1.

"Uncontrollable Authority."—See TRUST, 2.

"Act for and with."—See WILL, 1.

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

HILARY TERM, 1878.

FIRST INTERMEDIATE.

*Williams on Real Property.*

1. Distinguish between a reversion and a remainder.

2. What do you understand by the foreclosure of an equity of redemption? Explain the necessity of it.

3. What is the distinction between a vested and contingent remainder as to liability to destruction.

4. Distinguish between incorporeal hereditaments, appendant, appurtenant, and in gross.

5. What is an *interesse termini*?

6. Give an example of a tenant in tail after possibility of issue extinct.

7. There is a grant to A. for life, remainder to B. for life, remainder to the heirs of A. in fee. B. dies during A's life. What estate has A. in the land?

*Broom's Common Law and Administration of Justice Acts.*

1. What is the "golden" rule for the interpretation of statutes given by Mr. Broom?

2. What are the preliminary matters according to Mr. Broom in regard to which an individual should satisfy himself before commencing an action?

3. Define the meaning of the expression "Estoppel by matter of record."

4. What is the effect of the endorsement of a bill (a) *in blank*, (b) by special endorsement? Is there anything further necessary to perfect the title of the endorsee to the bill, and if so, what?

5. A. is the owner of a vessel which B. voluntarily undertakes to get insured; B. neglects to do so, and the vessel being lost A. thus sustains damage through the non-performance of his undertaking by B. Will A. have any redress, and why?

6. Distinguish between *larceny* and *obtaining goods by false pretences*."

7. What summary method is given by statute to a judgment creditor of reaching lands conveyed away by the judgment debtor by a conveyance which is void, as being made to delay, hinder or defraud creditors? Describe shortly the different steps to be taken.

CERTIFICATE OF FITNESS.

*Smith's Mercantile Law. Common Law Pleading and Practice, and The Statute Law.*

1. Define a *corporation aggregate*. By what means only can it usually express its intention? What exceptions to this exist in the case of a *trading corporation*, and on what grounds are such exceptions based?

2. Give instances referred to by Mr. Smith where the nomination of an agent must be (1) in writing, (2) by deed.

3. Under what circumstances, if any must an agent contracting in his own name for an undisclosed principal sue in his own name? Explain your answer.

4. What exceptions are there in favour of trade (1) to a landlord's right to distrain goods on leased premises for rent; (2) to his right to fixtures affixed by the tenant to the freehold during tenancy?

5. What steps must be taken by the holder of a bill of exchange in order to hold endorsers liable on the bill after maturity? Answer fully.

6. Define shortly the duties and liabilities of a common carrier at common law.

7. A, in consideration that B would not sue C, promises to pay the money due from C to B. Would A be liable on his promise? If so, why? If not, why not?

8. A sells B a field of hay, not to be paid for till a future period, and not to be cut till paid for. Before the day of payment the hay is accidentally destroyed. What are the respective rights and obligations of A and B in the case.

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS—REVIEWS.

9. Give a short sketch of the practice regarding the examination of judgment debtors as to their property, stating the conditions necessary to enable a judgment creditor to proceed with such examination, and stating also the practice in case the judgment debtor happens to be a corporation.

10. In case of the hearing of a summons pending before a Judge it becomes requisite to have some papers in the hands of your opponent produced for use on the hearing, what means would you adopt for attaining this end, and by what authority would you act in adopting such means?

—  
CALL.

—  
*Equity.*  
—

1. What is a general demurrer? What is a special demurrer?

2. With what degree of certainty must the material facts be alleged in the plaintiff's bill of complaint?

3. Under what circumstances may a plaintiff be entitled to specific performance of a written contract with a parol variation?

4. What must appear on the written memorandum respecting the sale of a parcel of land, so as to entitle the plaintiff to specific performance?

5. What is meant by charities? Suppose a person make a valid gift of money to a charity, expressing a general intention of charity, but the named charity does not exhaust the gift, what becomes of the surplus?

6. After foreclosure of a mortgage, has the mortgagee any, and if so, what remedy against the mortgagor in respect of the mortgage debt.

7. Where there has been a fraudulent alienation of trust property, when can the cestui que trust follow the property, and when not?

8. A mortgagee having sold the mortgaged lands under a power of sale contained in the mortgage, more is realized than is owing to him, and the mortgagee cannot find the person entitled to this surplus, what disposition may the mortgagee make of this surplus so as to be free from further accountability therefor?

9. What is meant by election to take under the instrument, and what by election against the instrument?

10. What right, if any, have executors to compromise debts due the testator?

## REVIEWS.

**VOID JUDICIAL SALES.** By A. C. Freeman. St. Louis: The Central Law Journal. 1877.

The title page amplifies the above description of this book as follows:—Void Execution, Judicial and Probate Sales, and the legal and equitable rights of purchasers thereat, and the constitutionality of special legislation validating void sales, and authorising involuntary sales in the absence of judicial proceedings.

This book will be of especial use to the legal profession in the United States, and the bulk of the cases cited are from the Courts of that country; but the English cases have apparently not been omitted. The author gives a clear exposition of the subject discussed; the subject, moreover, is new, at least in its present shape, and the book will be a great saving of time to the busy practical man who has to look up the law on any point within the limits the author has laid down for himself.

—  
**A MANUAL OF CRIMINAL LAW;** including the mode of procedure by which it is enforced; especially designed for the use of students. By Emory Washburn, LL.D. Edited with notes by Marshall D. Ewell. Chicago: Callaghan & Co. Chicago, U. S. 1878. R. Carswell, Toronto.

This is, as the title-page testifies, an elementary book. Coming from the late Professor Washburn it cannot but be good. It is designed "to serve the student the purposes of an outline map of the country he has to travel over" in his wanderings after a complete knowledge of the criminal law. The author adopts the plan of tracing a criminal prosecution from its incipient stage before the magistrate, to its final judgment and sentence, and in the main follows in his arrangement the treatise of Mr. Chitty on the criminal law. The matter was prepared for the press by Mr. Ewell after the author's death. The book is attractive in shape and style, and the typographical execution is of the very best.

## REVIEWS.

**THE DOCTRINES OF THE LAW OF CONTRACT IN THEIR PRINCIPAL OUTLINES, stated, illustrated and condensed. By Joel Prentiss Bishop. St. Louis: Soule, Thomas & Wentworth. 1878. R. Carswell, Toronto.**

This is in Mr. Bishop's own particular style; its merits may be assumed from the reputation of its author. It is, he tells us, the outgrowth of a plan to collect in simple and compact language, and arrange in an order of his own, the essential doctrines of the law of contract. He says he has felt in books on this subject "for the ribs in the body of the law of contract, and for the spinal column, but could not distinguish rib or backbone from muscle." He has accordingly made a skeleton in the shape of short legal propositions, arranged under the various chapters into which he has divided his matter. We do not quite agree that the arrangement of the author is in all respects the best; but it certainly has the merit of being in many ways novel. Nevertheless, whilst there is originality in every page, the reader finds when he has read a few pages that he has had firmly impressed on his mind an amount of first principles or "ribs" which make it clear to his mind that the author has something approaching a genius for evolving principles out of a maze of illustrations. It is thus a valuable book for students, for practitioners, and for the man of business. These propositions, without the authorities cited, would not be of much use to those who have to apply them to the particular case before them. We could wish to see this skeleton covered with the Canadian authorities, and so made more useful to us; the cases cited are almost exclusively American. The work is a valuable addition to the many that have been written on this most important branch of the law.

and States Courts in the United States, as well as selected cases, important to American lawyers, from the English, Irish, Scotch, and Canadian Law Reports, with notes and references.

The whole value of this series will depend upon the care and research of the compiler. As far as we, in this Dominion are concerned, it will be valuable only so far as the leading American cases are concerned. As we have access to the rest of the matter in other ways. The American cases seem, on the whole, to be selected with much care, though many of them are not applicable to the law as it stands on this side of the border, and some are curiosities in their way. The judgment in the case of *State v. Neely* is not only a curiosity, but an outrage on common sense, law and justice. The Court that pronounced it was as devoid of legal knowledge as it was filled with blind, unreasoning prejudice. The prisoner was indicted for an assault to commit rape. The evidence was simply that the prisoner saw the prosecutrix walking through a wood. He called to her to stop; she ran on and he followed her a short distance, being about seventy yards from her, until she came to a clearing, when he walked off in another direction. He was convicted on this evidence. On an appeal, this conviction was sustained. The only way we can account for such a result is, that the prisoner was a negro and the *locus in quo* was North Carolina. We notice in this volume the case of *The People v. Wilson*, which was referred to in *Reg. v. Wilkinson*. The Canadian authorities republished are *Reg. v. Belmont*, *Reg. v. Hennessey*, *Reg. v. Starr*, and *Reg. v. Smith*.

## BOOKS RECEIVED.

**AMERICAN CRIMINAL REPORTS. By John G. Hawley, late Prosecuting Attorney at Detroit. Vol. I. Chicago, Callaghan & Co., Law Publishers, 1878. R. Carswell, Toronto.**

This is the first of a series designed to contain the latest and most important criminal cases determined in the Federal

**A COMPENDIUM OF ROMAN LAW. By Gordon Campbell, M.A., of the Inner Temple, London. Stevens & Haynes, Law Publishers, Bell Yard, London. 1878. Willing & Williamson, Toronto.**

**MAYNE ON DAMAGES. Third edition. By J. D. Mayne and Lumley Smith.**



## BOOKS RECEIVED—FLOTSAM AND JETSAM.

London : Stevens & Haynes. 1878.  
Willing & Williamson, Toronto.

WHEATON'S INTERNATIONAL LAW. English edition. By A. C. Boyd. London : Stevens & Sons, Law Publishers, 119 Chancery Lane. 1878. R. Carswell, Toronto.

LAW OF TRADE MARKS AND GOODWILL. By L. B. Sebastian, B.C.L., &c. Stevens & Sons. 1878. R. Carswell.

PRACTICE OF THE SUPREME COURT OF JUDICATURE IN ENGLAND. By John Indermann, Solicitor, &c. London : Stevens & Haynes. 1878. Willing & Williamson.

THE CONSTABLES' MANUAL. By S. R. Clarke, Barrister, Toronto. Hart & Rawlinson, 1878.

## FLOTSAM AND JETSAM.

The following—shall we call it—*Process*, has been sent to us. The ingenious inventor ought to patent it, should he not be previously incarcerated for felony under the enactment which provides that "Every person who knowingly acts or professes to act under any false colour of process of the Court shall be guilty of felony." The document, which we forward to the County Attorney of Bruce, is in the size, style and shape of a Division Court Summons, and is as follows :—

"FINAL NOTICE BEFORE PROCEEDING IN THE

Division  Court.

For the more easy recovery of small debts and demands as per Act for Division Courts.

—o—  
(Name.)

VS.

(Name.)

TAKE NOTICE that unless the sum of \$3 and 80 cents, due from you to us be paid within ten days from date hereof, you shall be proceeded against under the above Act; which enacts that, after ten free days, execution pass hereon for the said amount, by arresting and poinding, but with certification, that if the defender agrees to pay by instalments, and he or she allow two instalments to run into the third unpaid, then, and in case, the indulgence of paying by instalments shall cease; and ordains execution to pass by the diligence aforesaid, for the whole sum decreed for and unpaid, in terms of the said Act of Parliament.

Dated at Kincardine, this fourth day of March, in the year of our Lord one thousand eight hundred and seventy eight years.

## EXPENSES.

Original Debt.	\$3	80
Cost of this application....		25
Postage .....		1
Total.....	\$4	06

P.S.—If you prefer settling with ourselves, before going into Court, bring this notice with you and avoid all costs."

On the 22d ult., as Sir George Jessel, Master of the English Rolls Court was alighting from his cab at the court door, he was shot at with a pistol in the hands of a lunatic, who had a few days before been removed from the court by his order. The bullet grazed the ear of the judge. The man was immediately arrested. On taking his seat on the bench, the judge remarked that assaults on civil judges in England have been extremely rare. The *Solicitors' Journal* can not recall within the last few years any instance of assault on a judge in a civil court more serious than that perpetrated by the man from Texas, who discharged at Vice-Chancellor Malins an egg of dubious freshness. But in 1616 Sir John Tyndal, one of the Masters in Chancery,

## FLOTAM AND JETRAM.

was killed by a shot fired at him, while entering his chambers at Lincoln's-inn, by a man called Bertram, against whom Sir John had given a decision. The assassin was examined before the Attorney-General and Solicitor-General "according to special directions given by his Majesty in that behalf," but committed suicide before he could be punished (see 2 Morant's History of Essex, 281). A few years later a very severe and summary punishment was inflicted on a ruffian who attempted to injure a judge of assize. Chief Justice Richardson at the assizes at Salisbury, in the summer of 1631, was assaulted by a prisoner, condemned there for felony, who, after his condemnation, threw a brickbat at the judge, which narrowly missed him. For this an indictment was immediately drawn by Noy against the prisoner, whose right hand was forthwith cut off and fixed to the gibbet upon which he was himself immediately hanged in the presence of the court (see 2 Dyer, 188b).—*Ex.*

THE London correspondent of a Chicago paper was in attendance on the great detective case at the Old Bailey, and was astonished beyond measure at the methods of English justice: "There did not seem to be an impression among the opposing counsel that they were deadly enemies because they happened to be engaged on opposite sides of the same case. Their treatment of each other was characterized by all the courtesy of gentlemen, such as one would find at a dinner-table or in the social intercourse of a drawing-room. The absence of unseemly squabble, of the ill-tempered wrangles of counsel made me homesick; and was an emphatic reminder that I was far from home, and among a strange, a singular people. My nostalgia was increased by the absence of anything like the bullying of witnesses. The man in the box was not made to believe that he was regarded as a deliberate perjurer. There seems to prevail here the singular—singular from an American legal standpoint—conviction that a man can be a witness on the other side without necessarily being a liar and a horse thief, and treated accordingly."—*Ex.*

LENGTH OF TRIALS.—A solicitor, says the *Solicitors' Journal*, moved by the recollection of the Tichborne trial, and the seven days' trial of the Penge case, has been at the pains to give, in a letter to a daily journal, an interesting analysis of the principal criminal trials which have taken place during the last fifty years, with a view to ascertain how far they differ, in intricacy, and in the number of witnesses examined, from the trials of the present day. The result of his investigation, as to the earlier trials, says the *Journal*, may be summed up as follows:—

"At Patch's trial, in 1806, for the murder of his partner,—a very intricate case,—there were thirty-three witnesses, and the trial lasted one day. Bellingham's trial, for the murder of Spencer Perceval, in which there were sixteen witnesses and long defence, lasted only one day. Thistlewood's trial, for the Cato-street conspiracy, with forty witnesses, lasted two days. In 1824 occurred Thurtell's trial, at which there were forty-six witnesses—including one who was an accomplice, and who was examined at considerable length, and another who was called in the course of the summing up. The trial lasted two days. In 1828, Corder was tried, a long indictment read, twenty-six witnesses; and the trial lasted one day and a-half. In 1828, Burke's trial took place; a long argument as to the indictment, sixteen witnesses (one of them being an accomplice), and the trial lasted one day. In 1831, Bishop, Williams and May were tried for the murder of the Italian boy; there were forty-one witnesses, and the trial lasted one day. In 1837, Greenacre's case: thirty-five witnesses, two days. In 1839, Frost, for high treason; there were sixty-nine witnesses, one whole day taken up with legal arguments, and the trial lasted seven days. In 1840, Courvoisier: forty-four witnesses, three days; and in the same year, Gould's case: forty witnesses, one day. In 1843, McNaghton's case: several scientific witnesses, forty-seven witnesses in all; two days. In 1845, Tawell: twenty-one witnesses, exclusive of those called to character, two days.

ELOQUENT TRIBUTE TO A PROFESSIONAL JURYMAN.—There was a pause, and a solemn stillness pervaded the court room when the venerable member of the bar rose to second the resolution. He said: "The deceased was a remarkable personage in the

## FLOTSAM AND JETSAM.

ranks of professional jurymen. He was an old liner, patient and steady as a clock, determined in opinion, ever ready to assume the cares and responsibilities of the occupation he had marked out for himself in this life. Men are prone to falter and lie out of it if they can, pleading business, measles in the family, much information and prejudice in the case. But he never shirked. When duty called, he was always there, and came as pure and unbiased as a dove. I doubt that we shall ever look upon his like again. Others may emulate his example, and by great experience, devotion to duty and thorough development of talent, rise high in the profession, but who shall take the place of him whose loss we mourn? I knew him long and well. We were friends. Much of my success in life and in pleading at this bar I owe to him. He never forsook a friend in the jury room. When I turn my eyes to that vacant and well worn chair at the end of the front row, I can almost see him as of yore, so calm, so composed, so like a Judge upon the bench. Towards the last, in the infirmities of years, he may have slept much at his post, yet so vast was his experience and intimacy with the requirements of his office, that he discharged his duties without embarrassment, and in a manner to satisfy his own conscience and one side of the contending factions. What more could mortal jurymen do? He was not, you may say, a popular man with his colleagues. He had enemies, as every man of decided opinions has. Some one envious of his success. He was, moreover, a stickler. The bent of his mind was toward disagreement. He held his comrades with a steady hand and either brought them round, or there was a dead lock. He was a leader of juries, or he went alone. Hence he incurred disfavour. More than once was his life imperilled in the jury room, but he calmly looked death in the face and hung on to the last. When, on one occasion, a mob of eleven strong men attacked him, and hauled him up to the ceiling several times to persuade him to submit, his unconquerable spirit did not flinch. And then on another occasion, when a similar mob kicked and gagged him, and

kept him without food and drink for five long days he was still for the disagreement and triumphed at last. There, if it please the Court, was the virtue of the old school. And all he asked was his *per diem*.

You take a jury that has sat through a long case of, say, two or three weeks, and that goes out to deliberate as constipated in bowels and ill-tempered in spirit as a sedentary hen; you lock that jury up in a cold and cheerless room, and let the Judge swear in his charge that they shall not get out or have a mite to eat or drink, or a change of socks until they bring in a verdict, and you may wager strong that they will agree, somehow, inside of a week. But when the deceased was among us this was not a safe investment. He was wonderfully constructed, physically and mentally, for protracted hanging. In a cow case, involving \$40, he held the jury nine days. One died of privation, and the other ten, emaciated and half insane, had to be carried into the court-room. This, he frequently remarked, was the proudest effort of his life. Disagreement was the characteristic of his existence—in the Squire's office, during a long career as a Coroner's juror, and then for half a century, in the higher walks of justice. He was born to be a jurymen; it was his sole aim on earth."

Then the Judge ordered the resolution to be smeared upon the records, and the chair of the departed properly draped.—*Cincinnati Commercial*.

THE author of "The Bar" thus depicts Vaughan at the bar:

"(Grisly and gruff, and coarse as Cambridge brawn, With lungs stentorian bawls gigantic Vaughan; In aspect fearless, and in language bold, 'Awed by no shame—by no respect controlled,' Straight forward to the fact his efforts tend, Spurning all decent bounds to gain his end. No surgeon he, with either power or will, To show the world his anatomic skill, Or subtle nice experiments to try— He views his subject with a butcher's eye, Nor waits its limbs and carcass to dissect, But tears the heart and entrails out direct."

Vaughan was made a judge, it was said, by George IV., at the instigation of his favourite physician, Sir Henry Hallford, and hence was called a judge by prescription.



## Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 41ST VICTORIA.

During this Term, the following gentlemen were called to the Bar, viz. :—

GEORGE FERGUSSON SHEPLEY.  
WILLIAM JAMES CLARKE.  
WILLIAM EGERTON HODGINS.  
JAY KETCHUM.  
ROBERT SHAW.  
HAMILTON PARKER O'CONNOR.  
WILLIAM CAVEN MOSCIP.  
JAMES JOSEPH ROBERTSON.

The following gentlemen were called to the Bar under 39 Vict. chap. 31. :—

DANIEL O'CONNOR.  
JOSEPH BAWDEN.

The following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

### *Graduates.*

ALEXANDER DAWSON, B.A.  
THOMAS DICKIE CUMBERLAND, B.A.,  
WILLIAM BANFIELD CARROLL, B.A.

### *Matriculants.*

FRANCIS BADGELEY WILLIAM MOLSON GILBERT LILLY.

JOSEPH MARTIN.  
J. A. C. REYNOLDS.

### *Junior Class.*

HUGH ARCHIBALD MACLEAN.  
WILLIAM BURGESS.  
LOUIS F. HETD.  
JAMES FOSTER CANNIFF.  
JOHN DOUGLAS GANSEY.  
GEORGE CORRY.  
EDMUND WALLACE NUGENT.

CHARLES PATRICK WILSON.  
DAVID MCARDLE.  
THOMAS HISLOP.  
WILLIAM ALEX. MCLEAN.  
ALEXANDER JOSEPH WILLIAMS.  
JAMES JOSEPH PANTON.  
WILLIAM MELVILLE SHOEBOOTHAM.  
JAMES GAMBLE WALLACE.  
GEORGE MOREHEAD.  
WILLIAM GEORGE SHAW.  
ROBERT PATTERSON.  
HARRY HYNDMAN ROBERTSON.  
JAMES ALEX. SEATTLE.  
MOSES MCFADDEN.  
ARTHUR B. FORD.  
GEORGE HIRAM CAPRON BROOKE.

### *Articled Clerk.*

HENRY WHITE.

## PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

### CLASSICS.

Xenophon, Anabasis, B. I. ; Homer, Iliad, B. I. ; Cicero, for the Manilian Law ; Ovid, Fasti, B. I., vv. 1-300 ; Virgil, Æneid, B. II., vv. 1-317 ; Translations from English into Latin ; Paper on Latin Grammar.

### MATHEMATICS.

Arithmetic ; Algebra, to the end of Quadratic Equations ; Euclid, Bb. I., II., III.

### ENGLISH.

A paper on English Grammar ; Composition ; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## LAW SOCIETY, HILARY TERM.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. *Museaus, Stumme Liebe. Schiller, Idd von der Glocke.*

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or,

Virgil, *Æneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography — North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, *Williams*; Equity, *Smith's Manual*; Common Law, *Smith's Manual*; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, *Leith's Blackstone*, *Greenwood* on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and

*Wills*); Equity, *Snell's Treatise*; Common Law, *Broom's Common Law*, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

*Blackstone*, Vol. I., containing the Introduction and the Rights of Persons, *Leake* on Contracts, *Walkem* on Wills, *Taylor's Equity Jurisprudence*, *Stephen* on Pleading, *Lewis's Equity Pleading*, *Dart* on Vendors and Purchasers, *Taylor* on Evidence, *Byles* on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—*Russell* on Crimes, *Broom's Legal Maxims*, *Lindley* on Partnership, *Fisher* on Mortgages, *Benjamin* on Sales, *Hawkins* on Wills, *Von Savigny's Private International Law* (*Guthrie's* Edition), *Maine's Ancient Law*.

## FOR CERTIFICATE OF FITNESS.

*Leith's Blackstone*, *Taylor* on Titles, *Smith's Mercantile Law*, *Taylor's Equity Jurisprudence*, *Leake* on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

*1st Year.*—*Stephen's Blackstone*, Vol. I., *Stephen* on Pleading, *Williams* on Personal Property, *Hayne's Outline of Equity*, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.*—*Williams* on Real Property, *Best* on Evidence, *Smith* on Contracts, *Snell's Treatise* on Equity, the Registry Acts.

*3rd Year.*—Real Property Statutes relating to Ontario, *Stephen's Blackstone*, Book V., *Byles* on Bills, *Broom's Legal Maxims*, *Taylor's Equity Jurisprudence*, *Fisher* on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

*4th Year.*—*Smith's Real and Personal Property*, *Harrie's Criminal Law*, Common Law Pleading and Practice, *Benjamin* on Sales, *Dart* on Vendors and Purchasers, *Lewis's Equity Pleading*, *Equity Pleading* and Practice in this Province.

N.B.—After Easter Term, 1878, *Best* on Evidence will be substituted for *Taylor* on Evidence; *Smith* on Contracts, for *Leake* on Contracts.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR JUNE.

1. Sat.. Last day for delivering appeal books.
3. Mon.. Sittings of the Supreme Court begin.
7. Fri.. Law Society Convocation meets.
8. Sat.. Easter Term ends.
11. Tues.. County Court sittings begin.
16. Sat.. Sittings of Court of Appeal.
17. Mon.. Burton, J., and Patterson, J., sworn in as Judges of Court of Appeal, 1874.
18. Tues.. Battle of Waterloo.
20. Thur.. Accession of Queen Victoria, 1837.
21. Fri.. Galt, J., sworn in as Judge of C. P., 1869.
23. Sun.. Hudson Bay Co. Territory transferred to Dominion, 1870.
25. Tues.. Law Society Convocation meets.
26. Queen Victoria crowned, 1837.

## CONTENTS.

## EDITORIALS :

## PAGE

Death of Mr. H. C. Wethey .....	163
Guardian and Ward .....	163
Acts of last Session .....	164
The Antwerp Conference .....	165

## CANADA REPORTS :

## ONTARIO :

## COMMON LAW CHAMBERS.

Trotter v. Toronto Water Works. <i>Corporation—Transfer of rights—Liabilities of successors—Amendment</i> .....	168
Ginty v. Rich. <i>Costs of examination of judgment debtor</i> ..	168
Bulder v. Kerr. <i>Affidavit—Nunc pro tunc</i> .....	169
Clark v. Clifford. <i>County Court case directed to be tried at Assizes—Notice of trial—Irregularity</i> ..	169
Duit v. Cossett. <i>Reference to arbitration</i> .....	170
Watts v. Hobson. <i>Sale of equitable interests under execution—Costs</i> .....	170
Cerrily v. Wells. <i>Order to examine—At issue</i> .....	170
Walker v. Terry. <i>Notice of Trial—Irregularity—Amendment</i> .....	170
Nicol v. Ewin; Lindsay v. Ewin; Darragh v. Ewin. <i>Abandoning Debtors' Act—Non-personal service of writ of summons—Priority of executions—Surplus proceeds of sale of land by mortgagee</i> .....	171

## CHANCERY CHAMBERS.

Jameson v. Leing. <i>Illusory suit—Taking bill of the files</i> .....	172
--	-----

## DIVISION COURT CASE.

Ralph v. The Great Western Railway Co. <i>Jurisdiction—Cause of action—Residence of Railway</i> .....	172
--	-----

## NOTES OF CASES :

Court of Appeal .....	173
Court of Chancery .....	174

## ENGLISH REPORTS :

Digest of the English Law Reports for August, September, and October, 1877 .....	174
--	-----

## LAW STUDENTS' DEPARTMENT :

English Examination Questions, .....	188
--------------------------------------	-----

## CORRESPONDENCE :

Stop Orders—Wilson v. McCarthy .....	185
--------------------------------------	-----

## REVIEWS .....

LAW SOCIETY OF UPPER CANADA .....	189
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## Canada Law Journal.

Toronto, June, 1878.

We regret to record the death of Mr. H. C. Wethey, Barrister-at-Law, and Reporter of the Court of Queen's Bench, on the 22nd ult. Mr. Wethey was called to the Bar in Hilary Term, 1871, and was appointed Reporter when Mr. Christopher Robinson, Q. C., resigned that position to be made Editor-in-chief. Mr. Wethey had no sinecure in the Reportership, and the illness which resulted in his death may be attributed indirectly to the effect of hard work on a delicate constitution. He was as a reporter most industrious and painstaking, whilst his kind, gentle and obliging disposition made him a great favourite with his professional brethren.

## GUARDIAN AND WARD.

The judgment in the recent case of *Collins v. Martin*, 41 U. C. R. 602, presents many points of interest, which are, however, not so entirely novel as is on all hands assumed in the report of the case.

It was there held that a guardian appointed by the Surrogate Court is in the nature of an agent or bailiff as to the estate of his ward, and that he had no power to demise in his own name the lands of the estate, inasmuch as the legal estate was in the infant. This same matter was somewhat discussed in the case of *Kinsey v. Newcomb*, 17 C. P. 99, where the same conclusion is reached, it being held that while the guardian may sue or defend in the name of the ward, the title to the land is in the ward.

The point is also well established in cases in Chancery that the lease of the

## GUARDIAN AND WARD—ACTS OF LAST SESSION.

guardian is absolutely void as a matter of law: *Townsend v. Neil*, 10 Gr. 72; *Switzer v. McMillen*, 23 Gr. 538. Such a guardian may, however, obtain permission from the Court of Chancery to lease the infant's lands under the provisions contained in the 50th section of the Chancery Act (see Rev. Stat. cap. 40, sec. 76). The lease would be of course in the name of the infant, and only in this way can a valid lease be obtained of the lands during his minority. It is to be observed that no lease will be sanctioned by the Court where such a course would be in conflict with the provisions of the instrument under which the infant derives title. The statute further provides (sec. 52) that such a lease shall not be made without the consent of the infant if he is of the age of seven years or upwards. This appears to be a relic of the ancient practice in the Ecclesiastical Courts mentioned by Lee, Justice, in Fitzgib. 164, where he noticed that the course of the Spiritual Court was that if the infant was under seven years they choose a curator, but if he is seven he chooses and the Court confirms. See Co. Litt. 88 B., Harg. u. 16. It is also a legislative recognition of the fact that there is a discretion at that age, which the Court should consult and respect.

Our attention has been called to the great oversight which frequently occurs in the appointment of guardians by Surrogate Courts. No provision is made in the order of appointment, for the regular passing of the guardian's accounts at stated periods before the Court. It as often happened that the greatest perplexity and expense in unravelling the accounts has resulted from the failure to interpose such a safeguard. It may be that no accounting takes place till the termination of the guardianship, at the majority of the ward, and then it is often impossible properly to vouch the ac-

counts. This might be avoided and the interests of both guardian and ward be better protected by the judge having regular times annually or bi-ennially as the case might be for the supervision and allowance of these accounts, and making it a term of his order that this accounting should be duly observed; and there should be some provision that if the accounts were, in the discretion of the judge and after proper notification to all parties interested, duly proved, that in the absence of fraud the guardian should be relieved from further liability to account.

It may be urged against this that County Judges have already duties of an over-multifarious character to perform. But the remedy for this is to carry out more systematically the appointing of junior or deputy judges, and making such arrangements as would invest them with the office of local masters in Chancery. Sooner or later the system of payment to officials by fees must be abolished; and if some such consolidation of judicial offices as are here indicated were effected then a respectable remuneration could be afforded, which would secure competent men for the work.

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 ACTS OF LAST SESSION.
 

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The Acts passed by the Dominion Parliament at its last Session which are of interest to the profession at large are not very numerous, we are glad to say. There is sufficient strain upon the average intellect in keeping track of the amendments, &c., of the Provincial Legislature. Let it suffice therefore, at present, to say that the Acts which the practising lawyer in Ontario should note are as follows:

An Act respecting the Maritime Court of Ontario.

An Act to amend the Act respecting

## ACTS OF LAST SESSION—THE ANTWERP CONFERENCE.

the Elections of Members of the House of Commons.

An Act to amend the Law relating to Stamps on Promissory Notes and Bills of Exchange.

An Act for the better prevention of crimes of violence in certain parts of Canada, until the end of the next Session of Parliament, which has since been declared in force in Montreal.

An Act to provide that persons charged with common assault shall be competent as witnesses.

An Act respecting persons imprisoned in default of giving securities to keep the peace.

The provisions of chap. 18, which is already in force are as follows :

1. On the summary or other trial of any person upon any complaint, information or indictment for common assault, the defendant shall be a competent witness for the prosecution or on his own behalf.

2. On any such trial the wife or husband of the defendant shall be a competent witness on behalf of the defendant.

3. Where another crime is charged and the Court having power to try the same is of opinion at the close of the evidence for the prosecution that the only case apparently made out is one for common assault, the defendant shall be a competent witness for the prosecution or on his own behalf, and his wife, or her husband if the defendant be a woman, shall be a competent witness on behalf of the defendant in respect of the charge of common assault : Provided, that this section shall only apply to cases tried without the intervention of a jury.

4. Except as in the next preceding section mentioned, this Act shall not apply to any prosecution where any other crime than common assault is charged in the information or indictment.

We have not space to publish chap. 10 as to Stamps on Bills and Notes ; it will however be found in a supplement to the *Canada Gazette*, together with some other Acts of general interest.

Of the Law bills that did not pass,

the principal were, Bill to amend the Supreme Court Act, which was lost in the Senate ; Bill to make better provision for the trial of Controverted Elections, which was withdrawn for further consideration ; Bill to amend the Law of Evidence in cases of misdemeanor, which was lost in the Senate ; Bills respecting registration of titles, &c., and to declare the rule of decision in the North-West Territories, which were withdrawn as time did not obtain to pass them this Session. It is a pity that a system of registration which can only be completely satisfactory which begins at the beginning of a title is not already in full force in these new countries. We have not examined the first of these North-West bills, but the second seems to have been carefully prepared, and bears internal evidence that the learned and veteran Law Clerk of the House, Mr. Wicksteed, Q.C., has had a good deal to say to it.

Four Bills were reserved for the signification of Her Majesty's pleasure thereon ; three of them private bills, and the fourth an Act to repeal sec. 23 of the Merchant Shipping Act, which would seem to be *ultra vires*.

### THE ANTWERP CONFERENCE.

The fifth Annual Conference for the Reform and Codification of the Law of Nations was held at Antwerp, from the 30th August to the 3rd September of last year (1877), and we have before us a pamphlet containing a report of the proceedings published for the use of members.

It may perhaps be desirable before noticing the proceedings of this particular meeting of the Association to give some slight sketch of the Association itself, its history and objects. It had its origin in America, springing at first



## THE ANTWERP CONFERENCE.

from the ideas suggested by the Washington Treaty and the Geneva Arbitration, that it was possible to form by the friendly counsel of Publicists, Statesmen, and leading Commercial men an International Code and International Tribunals by which the various laws and usages which affect nations in their mutual transactions (as distinguished from the Municipal laws of different States) might be brought at least to some extent into harmony, and so diminish the occasions of contention between them. "Substituting," as was said in the Society's original resolution, "the Arbitrament of Reason and Justice for the Arbitrament of the Sword."

The Association held its first meeting at Brussels on October 10th, 1873, and while not neglecting the original intention of its Founders, wisely determined first to deal with questions of law and usage affecting individual interests throughout the world. The special subjects upon which at this meeting that we are now discussing it has made its report are those of General Average and of Bills of Exchange, both, it is hardly necessary to say, of the utmost importance to mercantile men throughout the civilized world. "All nations," says the Right Hon. Lord O'Hagan, President of the Association (speaking of bills of exchange), "in which such instruments are employed for the purposes of commerce, have a common interest in making them by a simple, speedy, and universally intelligible procedure promptly negotiable and easily convertible." He further pointed out that the various German States as far back as 1849 have, under the auspices of Prussia, drawn up a Code of Laws affecting these instruments, which at this moment arranges the commercial dealings, not only of Germany, but also of Austria, Hungary, Sweden, Switzerland, Finland and Ser-

via; and that Spain and some of the South American States have in like manner adopted the French Code on these points. He went on to say that encouraged by these precedents the Association formed a Commission for considering the principles on which such an International Code should be based, and they issued a statement of their opinions on the subject which was adopted in 1876 at Bremen.

The subject of General Average is of scarcely less importance to mercantile men and is equally involved in difficulty from the variance of the laws and customs of different States, which variance often produces much delay and injustice. It is then, these two great subjects of almost universal interest that the Association at their last meeting proposed to examine and report upon, in the hope of inducing the various mercantile communities to make an effort to bring their differing laws into conformity one with another. During the year 1876-77 the following subjects have been discussed and reported on by the Committees of the Association: International Patent Law and the Laws of Copyright. The possibility of introducing an International Coinage, the question of Maritime Capture, the principles of Extradition and International Criminal Law, International Arbitration and the Law of Collisions at Sea. All questions of vital importance and concerning which the laws of different States are in their relation to one another various and vague.

The proceedings of each day's sitting were briefly as follows: Thursday, Aug. 30th, Dr. Tristram, Judge of the Consistory Court of London, read an able paper on "the execution of Judgments and Orders of Foreign Courts," which paper and the subject generally was referred to a Committee. Friday, Aug. 31st, Mr. H. Richard, M.P., read a paper

## THE ANTWERP CONFERENCE.

on "The Obligation of Foreign Treaties," and a motion suggesting that all Treaties should contain an Arbitration Clause was adopted.

Dr. S. Borchardt presented to the meeting the report of the Committee upon Bills of Exchange, embodied in six articles which after some discussion, were carried. The assimilation of the Bankruptcy Law of different nations was then discussed and committees appointed to consider and report on it.

On Saturday, Sept. 1st, Sir Travers Twiss read a paper on Continuous Voyages—Belligerent Maritime Law. Dr. Thompson reported on Copyright. Mr. J. C. Colfavru, Advocate of the Court of Appeal of Cairo, communicated the contents of papers by various gentlemen on the subject of "International Tribunals." Mr. Engels submitted the report of the Committee on General Average.

Monday, Sept. 3rd, Mr. H. Richard laid on the table the report of the Committee upon "Principles of International Law to govern the intercourse between christian and non-christian peoples."

Mr. Alexander read the report of the Committee on Patents and Inventions.

Count Maillard de Marafy submitted to the meeting a draft law on Trade Marks prepared by the Manufacturers' Union of Paris to consider which a committee was formed.

Mr. Edgar Hyde read a paper on Extradition. Mr. Heemskerk read an essay as to "Treaties to succour Shipwrecked Mariners."

A committee was formed on the motion of Dr. Bredius to consider the subject of International Coinage.

After these papers were read and discussed and committees appointed to examine and report upon them, a vote of thanks was tendered to the President, and the meeting of the Association was closed. The next meeting will be held

at Frankfort-on-the-Main about the 20th August, 1878.

The Dominion of Canada, as appears by the list of officers of the Association was represented by the Honorable Sir W. B. Richards, the Hon. J. S. Sanborn, LL. D., and the Hon. Sir W. Young. We understand, however, that they were not present at the Conference.

The foregoing is a very short review of the various important subjects which were discussed at this meeting of the Association of which it is not too much to say that its objects are some of the grandest which ever occupied the attention of civilized man, namely, the bringing into universal brotherhood the various nations of the world, and substituting the reign of peace and law for that of war and brute force.

It is incumbent on every civilized nation and individual to encourage by every means in their power the work of a society whose labours are so essentially connected with the welfare of mankind, and we heartily wish it all prosperity and success. It is earnestly to be hoped that urged by the labours and efforts of this Association, the Governments of the civilized world may see the value of, and agree in adopting a Common Code on some at least of these and other subjects of International disagreement. We are not sanguine that these means will render possible "the Parliament of Man," or "the Federation of the World," which have existed in the dreams of Poets and Poetical Enthusiasts. A mightier force is required for that; nor do we believe that any conference will ever prevent "nation from rising against nation," nor can it be contended that the last conflict is any evidence of great success in the attempt to ameliorate the horrors of war; but if the labours of those learned and hopeful men who compose these conferences has the effect in the

C. L. Cham.] TROTTER v. TORONTO WATER WORKS COMMISSION—GINTY v. RICH. [C. L. Cham.]

slightest degree of mitigating those horrors or rendering them less frequent, they will have deserved well of humanity.

## CANADA REPORTS.

### ONTARIO.

#### COMMON LAW CHAMBERS.

(Reported for the *Law Journal*, by N.D. BROW,  
Student-at-Law.)

#### TROTTER v. TORONTO WATER-WORKS COMMISSION.

*Corporation—Transfer of rights—Liabilities of successors—Amendment.*

§The defendants were incorporated by 35 Vict. c. 79, and a time was by that Act limited for the completion by them of the water-works. 39 Vict. cap. 64, amended this Act, and by section 4 it was enacted that the time for the completion of the water-works should be extended till December 31, 1877, and that upon that day the said commission and the powers and duties thereof should cease and be determined, and the said water-works should thenceforth be controlled by a committee to be annually appointed for that purpose by the Corporation of the City of Toronto; provided that the provisions of this section, except as to the extension of the time for the completion of the works, should not come into operation unless and until on or before Dec. 31, 1877, the assent of the ratepayers should be obtained thereto. A by-law to this effect was passed. This action was commenced before the passing of the by-law.

*Held*, 1. On a consideration of all the statutes relating to the defendants that they were properly sued.

2. That though it was not expressly provided that the liabilities of the defendants should be transferred to the city, it was necessarily implied by the transfer of their rights.

3. That under the extensive powers of amendment conferred by recent statutes, there was power to substitute the city as defendants.

[Mr. DALTON.—HAGARTY, C.J.—March 2.

*Galt* obtained a summons calling upon the defendants and the City of Toronto to show cause why the latter should not be substituted as defendants.

The circumstances under which the application was made appear from the head-note and the arguments.

On the return of the summons,

*Biggart* showed cause. The plaintiff has been too dilatory in all his proceedings. The writ issued Dec. 8, 1876. The declaration was not filed until Nov. 29, 1877. Issue was

joined on Dec. 22, and on Dec. 31 the defendants ceased to exist. It is said the statute gave the right to sue the Commissioners, but it also takes away the right and leaves plaintiff without remedy. The plaintiff should have brought his action against the city; if not, he is at all events bound by his election in suing the Commissioners. If the amendment asked be made, it will necessitate an entire remodelling of the pleadings.

*Galt*, contra. All the statutes relating to the Commissioners show that the plaintiff was right in commencing his action against them: 35 Vict. c. 79; 37 Vict. c. 75; 39 Vict. c. 64; 40 Vict. c. 39. The defendants having been dissolved and their rights having been transferred to the city, their liabilities are also transferred: *Cayley v. C. P. & M. R. & M. Co.*, 14 Gr. 571; *Dillon on Corporations*, 2nd ed., sec. 114 and note. Under the provisions of the Administration of Justice Act, this order should be made.

Mr. DALTON.—On a consideration of all the statutes mentioned, I think the plaintiff proceeded properly in issuing his writ against the Commissioners. They are a corporation independent and separate from the city. The words of 39 Vict. c. 64, s. 4, may not be wide enough expressly to transfer the liabilities of the Commissioners to the city, but it follows as a legal effect from the transfer of their rights. This being so, the only question is whether I have power to amend the proceedings by substituting the city as defendants. I think I have this power under the Administration of Justice Act (now C.L.P.A.)

On appeal from this decision,

HAGARTY, C.J., varied this order by providing that if it should be held that the plaintiff should have commenced his action against the city and not against the Commissioners, the plaintiff should be considered as having commenced his action against the city on the date of the order.

*Order accordingly.*

#### GINTY v. RICH.

*Costs of examination of judgment debtor.*

*Held*, that on an application for that purpose merely, a judgment debtor cannot be ordered to pay the costs of his examination.

Such an order can be made only on an application to commit, and then only by way of punishment.

[Mr. DALTON.—March 25, 27.

A summons had been taken out calling upon a judgment debtor to shew cause why he

C. L. Cham.]

BUILDER V. KERR.—CLARK V. CLIFFORD.

[C. L. Cham.]

should not pay the costs of, and incidental to an order for his examination, and of and incidental to his examination thereon.

*Holman* moved the summons absolute. There is no reason, except that it has not been the practice, why the order for the examination should not, in the first instance, be made with costs, and if it be shown, as it is here, that the examination enabled the judgment creditor to collect his debt, there can be no possible reason why the order for costs should not be made now.

*Haggart, contra.* A Judge in Chambers has no jurisdiction to make an order.

Mr. DALTON.—If there were any jurisdiction to make an order such as is asked, I should most certainly do so in this case; but the statute gives no power, nor can I find any case in which such an order has been granted in Chambers. I believe I have known judges direct a judgment debtor, who has been examined, to pay the costs of his examination, but only on applications to commit, where an order against him is by way of punishment, and not as a matter of right to the judgment creditor. As to this direct application for costs, there is no authority in the Statute—nor outside of it, so far as I know—to make the judgment debtor pay them. I discharge the summons, but without costs.

*Order accordingly.*

#### BUILDER V. KERR.

*Attachment of debts—Affidavit—Filing nunc pro tunc.*

*Held*, 1. That an affidavit to obtain an attaching order must be made by the execution creditor or his attorney; an affidavit made by a managing clerk is insufficient.

2. That where the debt attached was still in the hands of the garnishee, and still in *status quo*, the judgment creditor should be allowed to file a proper affidavit *nunc pro tunc*.

3. That an attaching order will not be set aside for irregularity on the argument of the summons to pay over, but only on a substantive application.

[Mr. DALTON—April 15.]

An attaching order and summons to pay over were granted in this case.

On the return of the summons,

*Aylsworth*, for the garnishee, showed cause. Sec. 307, C. L. P. A. (Rev. Stat.) requires the affidavit on which an attaching order issues, to be made by the judgment creditor or his attorney. This affidavit is made by a managing clerk and is therefore insufficient.

Mr. W. Read (Read & Keefer), *contra*.

The affidavit is sufficient. It has been decided that an affidavit under the A. J. Act to

obtain an order to examine is sufficient if made by a managing clerk. I ask leave to file an amended affidavit now.

*Aylsworth* in reply. In the A. J. Act the word "agent" is used, which does not occur in this section. The judgment creditor cannot now file an amended affidavit. Both the attaching order and the summons must be discharged.

Mr. DALTON.—I think that, to comply with the Act, the affidavit should have been made by the judgment creditor or his attorney, and therefore the affidavit filed is not sufficient. In looking through the cases, I found none in which the attaching order has been set aside, except on a motion expressly made for that purpose, and I think it cannot be attacked on showing cause to the summons to pay over. At all events, as the money in dispute here is still in the hands of the garnishee, and the relation of the parties remains unchanged, I shall give the judgment creditor leave to file a proper affidavit now, and make the summons absolute.

*Order accordingly.*

#### CLARK V. CLIFFORD.

*County Court case directed to be tried at Assizes—Notice of trial—Irregularity.*

*Held*, that where a County Court case was ordered to be tried at the sittings of Assize and Nisi Prius, a notice of trial given under the order, but not in accordance with the terms of the order, must be moved against in the County Court.

[Mr. DALTON—April 19.]

An order had been made under the A. J. Act, sec. 32, that this case should be tried at the sittings of Assize and Nisi Prius for a certain county. The plaintiff having given notice of trial for the next sittings, the defendant moved against it as being too short notice by the practice of the Court, and by the terms of the order for trial in the County Court.

*Holman* shewed cause. The application should be made to the County Court Judge, and not here: sec. 34.

*Watson, contra.* Sec. 34 gives the County Court Judge power only to entertain motions to postpone the trial, not to set aside the proceedings for irregularity.

Mr. DALTON.—This is a County Court case. I have, therefore, no jurisdiction over it, unless it be given by the statute. Any application against the notice of trial as being given too late should be made to the County Court.

*Summons discharged, without costs.*

C. L. Cham.] DUIT V. COSSETT.—WATTS V. HOBSON.—CERRIBY V. WELLS. [C. L. Cham.]

## DUIT V. COSSETT.

*Reference to arbitration.*

Where an application is made to refer a case to arbitration after writ issued and before plea, and the defendant desires to plead payment into Court, the proper course is, not to order the cause to proceed that the payment may be set up by plea, but, from analogy to the old practice on payment into Court to strike the amount paid into Court out of the plaintiff's claim.

[Mr. DALTON—April 20.]

This was an application to refer the cause to arbitration under C. L. P. A. (Rev. Stats.) sec. 189.

*Ewart* moved the summons absolute.

Mr. Bull (Beaty, Chadwick & Biggar), *contra*, was willing to consent, but said that the defendant wished to plead payment into Court as to a portion of the demand, and asked that the cause should first be allowed to go to issue.

Mr. DALTON.—There is no need that the case should go to issue. I have, in other such cases, followed the practice which was formerly pursued before payment into Court was pleaded. That practice was to obtain an order to "strike the amount out of the declaration." The order of reference will direct that the amount paid in be deducted from the amount of the plaintiff's claim.

*Order accordingly.*

## WATTS V. HOBSON.

*Sale of equitable interests under execution—Costs.*

Costs of an application to sell an equitable interest in lands under *fi. fa.* ordered to be taxed and endorsed as part of the costs of execution.

[Mr. DALTON—April 29, May 2.]

A summons had been taken out calling on the defendant to shew cause why his equitable interest in a certain parcel of land should not be sold by the sheriff under writ of *feri facias* against the defendant's lands, under A. J. Act Rev. Stat. O., cap. 49, sec. 11.

*Ogden* moved the summons absolute, and asked for the costs of the application.

No cause was shewn.

Mr. DALTON.—I do not feel sure, but I think that the defendant should pay the costs of this application; but, to save expense, I direct that they be taxed, and inserted in the endorsement as part of the costs to be levied under the writ.

*Order accordingly.*

## CERRIBY V. WELLS.

*Order to examine—At issue.*

An order to examine defendant granted in an action

of tort where interlocutory judgment had been signed for want of a plea.

[Mr. DALTON—May 1.]

Mr. Chamberlen (Richards & Smith) moved for an order to examine the defendant under the C. L. P. A. sec. 156, on an affidavit shewing that the action was an action for seduction, and that interlocutory judgment had been signed against the defendant default of plea.

Mr. DALTON.—I will make the order; I do not think that the words "at issue," used in the statute, were intended to have any technical meaning, but were merely intended to mark the stage of the proceedings at which the order should be granted—i.e., when the question which would be in issue at the trial should be known.

*Order made.*

## WALKER V. TERRY.

*Notice of trial—Irregularity—Amendment.*

An irregular notice of trial was amended *nunc pro tunc* on the plaintiff's application, it not being shewn that the party served was misled.

[Mr. DALTON—May 12.]

A notice of trial was given for "the next sittings of Assize and Nisi Prius to be holden at the City of Belleville, in and for the County of Prince Edward, on," &c. (mentioning the day fixed for the sittings at Picton, in the County of Prince Edward). The venue in the action was laid in the County of Prince Edward, and the Belleville assizes were over when the notice was served.

*Watson* moved absolute a summons to allow the notice to stand good and to amend it *nunc pro tunc*.

Mr. Chamberlen (Richards and Smith), *contra*. Irregular proceedings have been allowed to be amended; but only in cases where defendants have applied to set aside proceedings. The defendant has a right to treat this as no notice at all. Moreover, his attorney swears that he cannot tell from it where the plaintiff intends going to trial.

Mr. DALTON.—From the notice alone perhaps the attorney is unable to discover where the plaintiff intended going to trial, but with his knowledge of the facts of the case, there can be no pretence that he has been misled. The practice is settled that, unless it is shewn that the party served is misled, the notice will be allowed to be amended *nunc pro tunc* on payment of costs. I allow the notice to be amended, and to stand good as of the date of its service, on payment of costs, which I fix at \$1.

*Order accordingly.*

C. L. Cham.]

NICOL V. EWIN.—LINDSAY V. EWIN.—DARRAGH V. EWIN.

[C. L. Cham.]

## NICOL V. EWIN.

(In the County Court of the County of Simcoe.)

LINDSAY V. EWIN.

DARRAGH V. EWIN.

(In the County Court of the County of Wellington.)

*Abseonding Debtors' Act—Non-personal service of writ of summons—Priority of executions—Surplus proceeds of sale of land by mortgagee.*

Some time prior to the 2nd of March 1876, defendant, having previously mortgaged his real estate, absconded from this Province. On that day Nicol commenced his action by writ of summons, and on the 31st of March, after attempts at personal service, served defendant's wife. On the 20th of April an order was obtained for leave to proceed as if personal service had been effected. On the 8th of May judgment was signed, and *f. fa.* lands placed in the hands of the Sheriff of Simcoe. On the 8th of April, 1876, Lindsay and Darragh issued writs of attachment against defendant, and on the 30th of November placed *f. fa.* lands in the said Sheriff's hands. On the 7th of May, 1877, the mortgagees sold under their power of sale, from the proceeds of which there remained a surplus.

*Held*, 1. That Nicol's writ of summons was "served" within the meaning of section 20 of the Absconding Debtors' Act before the issue of the attachments, and he, having obtained judgment first, was entitled to be paid in full.

2. That the rights of the execution creditors in respect of the defendant's equity of redemption remained unchanged by the sale by the mortgagees.

[April 26, May 1.—Mr. DALTON.

This was a special case, stated by consent, for the opinion of Mr. Dalton in Chambers.

The facts, as stated more at length in the special case, were shortly as follows :—

1. Ewin absconded from the Province prior to the 2nd of March, 1876. Nicol, on that day, issued a specially endorsed writ against Ewin and one H. Interlocutory judgment was entered against H. for default of appearance. On the 31st of March Ewin's wife was served, and on the 20th of April an order obtained to proceed as if personal service had been effected. On the 8th of May writs of *f. fa.* goods and lands were placed in the hands of the Sheriff of Simcoe.

2. On the 8th of April, 1876, Lindsay issued an attachment in the County Court of Wellington, under the Absconding Debtors' Act, against Ewin, and placed it in the said Sheriff's hands on the 13th of April. On the 30th of November *f. fa.* goods and lands were placed in the said Sheriff's hands.

3. Exactly the same proceedings were taken in Darragh's case.

4. At the time Ewin absconded he was the

owner of the equity of redemption in a certain parcel of land in the County of Simcoe.

5. The mortgagees of Ewin, on the 7th of May, 1877, sold the lands under the power of sale contained in their mortgage, and realized more than enough to pay the mortgage.

6. Ewin had no other available assets.

7. There were no other incumbrancers except those mentioned.

8. The question for the decision of Mr. Dalton was—whether Nicol was entitled to be paid in full out of the surplus in the hands of the mortgagees, or should rank *pari passu* with Lindsay and Darragh?

O'Brien for Nicol.

Creelman for Lindsay and Darragh.

The following authorities were referred to :—Absconding Debtors' Act, secs. 20, 28, 30; *Potter v. Carrol*, 9 C. P. 442, 448. *Daniel v. Fitzell*, 17 U. C. R. 369; *McKay v. Mitchell*, 6 U. C. L. J. 61; *Smith v. Trust and Loan Co.* 22 U. C. R. 525,

Mr. DALTON.—I think the process in Nicol's case was served in the terms of the statute before the suing out of the writs of attachment. I do not think personal service was necessary.

This being so, unless the fact of the sale by mortgagees alters the position of the parties, Nicol is entitled to be paid in full. It appears to me that the right to surplus must follow the course of the property out of which it arose, as if it had continued in its original condition as land. Nicol could have redeemed the mortgagees, because his *f. fa.* was a lien and encumbrance on Ewin's land; or suppose Ewin dead, the rights of Ewin's heir and executor as to the surplus would have stood thus: Had the mortgagees sold during Ewin's life time, the executor would have been entitled to the surplus, if after Ewin's death his heir; because, in the first case, Ewin would have died owning personal property: in the latter, owning real property; and so in the different cases the executor or heir would have been entitled accordingly. The reason is, that the Building Society could not change the nature of the property beyond their own interest in it adversely to the interests of others concerned, nor alter the legal devolution of the title to the surplus in prejudice of the vested interest of another. In this case the writs of *f. fa.* were all in the Sheriff's hands, while the equity of redemption was yet in Ewin, and bound the property as realty, subject to the claims of the mortgagees

Ch. Cham.]

JAMESON V. LAING.—RALPH V. G. W. R. Co.

[Div. C. Cases.]

The surplus, therefore, falls to the first execution creditor, to the extent of his charge, and it is to him, as it seems to me, that the mortgagees are bound first to account.

The case of *McKay v. Mitchell*, 6 L. J. U. C. 61, is at first sight startling; it has, indeed, occasioned the only difficulty I have felt, and it seemed to me at first a great difficulty, which will be well understood when it is considered who decided that case.

This case does, in effect, if taken absolutely, decide that the lien of a registered judgment was defeated by such a sale as the present, and that the surplus was garnishable as a debt to the mortgagor by the first comer. Now, I take the registered judgment there to have been just in the position of Nicol's execution here, in so far as respects the present question, and the case, therefore, seems to be exactly in point against the propositions I have stated above. But, on reading carefully the judgment of the learned Chief Justice, it is apparent that he is dealing only with the rights of the parties who were then before him and with those rights as they existed strictly at law. Here, however, the whole rights of the parties in law and equity are referred to me, and I think I act upon well understood principles in deciding that Nicol is entitled to be paid in full out of the surplus in the hands of the mortgagees as is claimed by him. That is my conclusion upon the facts of the case.

I refer to Fisher on Mortgages, 2nd Ed. 674, and to Coote on Mortgages, 3rd Ed., 516.

## CHANCERY CHAMBERS.

JAMESON V. LAING.

*Illusory suit—Taking bill off the files.*

A plaintiff in an action at law filed a bill and registered a *lis pendens* against defendant's lands for the sole purpose, as was clearly shown by affidavits filed, of preventing a disposal of them before plaintiff should obtain execution. *Held*, that in the absence of a direct admission by the plaintiff that the suit was a fictitious one, the bill could not be taken off the files, nor the *lis pendens* discharged. The proper course, where the affidavits filed make out a clear case, is for the judge to direct the cause to come on for hearing at the earliest day.

[*Referee*, April 4—*Blake*, V.C.—April 29.]

Plaintiff, having sued defendant at law and fearing that defendant might dispose of certain real property before he could obtain judgment, filed a bill setting up a fictitious con-

tract for sale of the property, and issued and registered a *lis pendens* against it. The defendant moved to take the bill off the files and to vacate the *lis pendens*.

*Watson*, for plaintiff, referred to several unreported cases.

*Hoyle*, for defendant, referred to *Seaton v. Grant*, L. R. 2 Ch. Ap. 459; *Robson v. Dodds*, L. R. 8 Eq. 301; *Mortlock v. Mortlock*, 20 L. J., N. S., 773; *Daniel Ch. Pr.*, 5th Ed., 326-7.

MR. STEPHENS, Referee, refused the motion with costs.

There was an appeal from this decision which was heard before

BLAKE, V.C.—The material necessary to support an application like the present must contain, as on an application at law to strike out a defendant's plea, a direct admission by the party himself. There being no such admission here, I must refuse to remove the bill; but having no doubt of the facts stated in the affidavits, I direct the cause to be brought to a hearing at the earliest opportunity. When such an application comes before the Referee in Chambers, and there is no doubt of its being a fictitious suit, a convenient course to pursue would be to enlarge the motion before a judge who might then direct an early hearing.

The question of the costs of the motion and appeal were reserved until the hearing\*.

*Order accordingly.*

## IN THE FIRST DIVISION COURT OF THE COUNTY OF MIDDLESEX.

(Reported for the *Law Journal* by G. GIBSON, M.A., Student-at-Law.)

RALPH V. GREAT WESTERN R. W. Co.

*Jurisdiction—Cause of action—Residence—Railway.*

*Held*, 1. That where a person having a return ticket for a passage from one place to another on a railway line is put off the train at an intermediate point, the cause of action arises at this latter place, and not where the ticket is issued.

2. That a railway company cannot be said to "reside or carry on business" except where their head office is situated.

[London—February 29.]

The facts of this case, as they appeared in

\* The plaintiff afterwards himself dismissed his own bill on *præcipe* before the hearing.

evidence, were these: The plaintiff bought a ticket for a passage on defendants' railway from London to Ingersoll and return. On going from London to Ingersoll, plaintiff gave one part of his ticket to the conductor, and on returning presented the other part to the conductor, who refused, as it was for a passage for the opposite direction—from London to Ingersoll. The plaintiff refusing to pay his fare, the conductor put him off the train at Dorchester, a distance of ten miles from London, but without the jurisdiction of this Court. The head office of defendants is at Hamilton.

When the case came on for trial, exception was taken to the jurisdiction, on the ground that the cause of action (if any) did not arise, nor did the defendants "reside or carry on business" within the jurisdiction of the London Division Court. By consent, this question was reserved for argument, and the trial was proceeded with, when a verdict was given for plaintiff, with \$15 damages. The question of the jurisdiction was afterwards argued by

*E. Meredith*, for plaintiff.

*H. Becher*, for defendants.

ELLIOTT, Co. J.—Suits in the Division Court must be entered and tried in the division in which the cause of action arose, or in which the defendant resides or carries on business: Rev. Stat., cap. 47, sec. 62.

The "cause of action" means the whole cause of action: *Watt v. Van Every*, 23 U. C. R. 196; *Kemp v. Owen*, 14 C. P. 432; *Carley v. Ficken*, 4 Prac. R. 258; *Noxon v. Holmes*, 24 C. P. 541.

In this case the contract was to carry the plaintiff from London to Ingersoll and back to London, and it is alleged that the defendants duly carried the plaintiff to Ingersoll, but on the return wrongfully ejected and forced the plaintiff from the cars at Dorchester, a distance of ten miles from London, whereby, &c.

Dorchester and London are in different divisions. Can it be said that the whole cause of action arose in the London division? It is contended on behalf of the plaintiff that it can—that the whole cause of action is comprised in the contract to carry the plaintiff to Ingersoll and back to London, and that the breach is the default to carry him back to London, and that thus the whole cause of action must be considered as having arisen in London. I cannot take this view of the case.

The complaint is, that the plaintiff was expelled from the cars at Dorchester, and the

damages, \$15, were asked and obtained, not because the plaintiff was not brought back to London, or because he was a few hours later in being brought back, but because of the expulsion at Dorchester. It appears, therefore, that this alleged unlawful expulsion was the most material matter of complaint, and as it took place at Dorchester, the whole cause of action did not arise in the London division.

In this view of the case the action should have been brought in the division where the defendants reside or carry on business. According to *Ahrens v. McGilligat*, 23 C. P. 171, this is where the head office is, and the evidence shows that place to be Hamilton. I conclude that this Court has no jurisdiction to try this cause, and, therefore, the proceedings must be regarded as *coram non judice*.

I have no power to give costs.

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

From C. C., Wellington.]

[May 14.

AUGER V. THOMPSON.

*Exchange—Fraud—Right to sue on common counts.*

The defendant gave a note made by one K. to the plaintiff in exchange for a buggy. The note was not paid at maturity, whereupon the plaintiff sued the defendant on the common counts for the price. *Held*, reversing the judgment of the County Court, the plaintiff could not recover, as no agreement to pay the price could be raised by implication of law.

*Bethune*, Q.C., for the appellant.

*Richards*, Q.C., for the respondent.

*Appeal allowed.*

From C. C. Bruce.]

[May 14.

WAMBOLD V. FOOTE.

*Promissory Note—Guarantee—Stat. of Frauds.*

*Held*, affirming the judgment of the County Court, that a verbal guarantee that a promissory note made by another would be paid at maturity was within the 4th section of Stat. of Frauds and therefore invalid.

*Cameron*, Q. C., for the appellant.

*Ferguson*, Q. C., for the respondent.

*Appeal dismissed.*



## NOTES OF CASES—DIGEST OF ENGLISH LAW REPORTS.

From C. C. Stormont, D. &amp; G.] [May 14.]

HOLT V. CARMICHAEL.

*Chattel Mortgage—Description.*

*Held*, affirming the judgment of the County Court that the words "one single buggy," in a chattel mortgage, was not a sufficient description to satisfy Rev. Stat. c. 119, sec. 23.

Bethune, Q.C., for the appellant.

Richards, Q.C., for the respondent.

*Appeal dismissed.*

From Chy.]

[May 14.]

BLASDELL V. BALDWIN ET AL.

*Partition—Water mill privilege.*

The plaintiff filed her bill for a partition of 200 acres of land on the river Ottawa, and a water mill privilege appurtenant thereto. She and the defendant A. H. had acquired the property in question as tenants in common, and A. H. had subsequently conveyed an undivided one-fifth of his portion to the four other defendants. The evidence showed that in order to divide the water-privilege very complicated structures would have to be made at heavy expense, and that a large sum of money would have to be expended annually in maintaining them. It also appeared the difficulties in carrying out the scheme would be very great.

*Held*, affirming the decision of Spragge, C., that under the circumstances a partition of the water privilege could not be decreed; and a sale thereof, together with a quantity of land sufficient for the purpose was ordered.

O'Connor, Q. C., and Bain for the appellant.  
Moss, for the respondent.*Appeal dismissed.*

## COURT OF CHANCERY.

V.-C. Blake.]

[May 13.]

THE QUEEN INSURANCE COMPANY V. DEVINNEY.

*Fire Insurance—Compromise of claim—Fraud.*

In order to prevent a compromise of a disputed claim being set aside, there must have been a matter of doubt to be settled, and there must be no fraud on either side: where, therefore, on the destruction of a house by fire, which had been insured, application was made

to the Insurance Company for payment who, after investigating the matter, so far as the facts within their knowledge enabled them to do so, compromised with the assured by paying a portion of the sum insured. Some months afterwards the Company, having received information which satisfied them that a fraud had been committed upon them, and that the assured had himself feloniously caused the fire, instituted proceedings to compel repayment. The Court being satisfied that the act as charged had been committed, made the decree as asked, with costs.

## ENGLISH REPORTS.

## DIGEST OF THE ENGLISH LAW REPORTS FOR AUGUST, SEPTEMBER, AND OCTOBER, 1877.

(From the American Law Review.)

ADMINISTRATOR—See EXECUTORS AND ADMINISTRATORS.

APPOINTMENT—See POWER; TRUST, 1.

ASSIGNMENT OF SUIT.

A creditor of a company began a suit for winding it up, and then assigned his claim and the right to proceed in the winding-up proceedings to a shareholder in the company, who undertook to carry on the suit. *Held*, that such a proceeding could not be allowed. —*In re Paris Skating Rink Co.* 5 Ch. D. 959.

ATTORNEY AND CLIENT.—See SOLICITOR.

BAILMENT.

Plaintiff (in each case) left his bag, worth more than £10, at the cloak-room of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak-room, and the words: "See Back." On the back it was stated that the company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room, in a conspicuous place. The judge left these questions to the jury: "1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff under the circumstances under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition?" Both questions were answered in the negative, and the judge ordered judgment for plaintiff. *Held*, that there must be a new trial. —*Parker v. The South Eastern Railway Co*; *Gabell v. The Same*; s. c. 1 C. P. D. 618.

—*Parker v. The South Eastern Railway Co*; *Gabell v. The Same*; s. c. 1 C. P. D. 618.

BANKRUPTCY.—See DETINUEE; PROXY; SET-OFF.

## DIGEST OF ENGLISH LAW REPORTS.

## BEQUEST.

1. Will in the following words: "I . . . bequeath to G. all that I have power over, —namely plate, linen, china, pictures, jewellery, lace,—the half of all valued to be given to H . . . The servants . . . to have £10, and clothes divided among them, also, all kitchen utensils." The testatrix had money and much other personal property besides that specified in the will. *Held*, that the will covered all the personal property of the testatrix.—*King v. George*, 5 Ch. D. 627; s. c. 4 Ch. D. 435.

2. Testator gave "all debts and sums of money . . . due me . . . by B. unto the said B., his executors, administrators, and assigns," &c. "And I direct that the said trustees . . . shall give and execute unto him or" his executors, &c., "a good and effectual release," &c. At the date of the will and at the date of the testator's death, B. owed him £50, and B. and his partner G. owed him jointly £300, and jointly and severally £2,300. *Held*, that the words of the will covered only the private debt of £50.—*Mc-partie Kirk. In re Bennett*, 5 Ch. D. 800.

See LEGACY 1, 2.

## BILL OF LADING.

One hundred barrels of oil and one hundred and six palm-baskets, consigned to defendants, were shipped under a bill of lading signed by plaintiff, containing the clause: "Not accountable for rust, leakage, or breakage." Some of the oil escaped and caused damage to the baskets. In an action for the balance of freight, the consignees set up a counter-claim for this damage. *Held*, that the exemption in respect of leakage did not extend to the damage caused by the oil which leaked out. *Thrift v. Youle*, 2 C. P. D. 432.

See EQUITABLE CHARGE.

## BILLS AND NOTES.

Testator drew a check, a few days before his death, payable to his wife or her order. She indorsed it and deposited it with foreign bankers, and drew against the amount. The checks were not presented for payment at the bank on which they were drawn until after the death of the testator. *Held*, a good *donatio causa mortis*.—*Rolls v. Pearce*, 5 Ch. D. 730.

See EQUITABLE CHARGE.

## BREACH OF TRUST.—See TRUST 2.

## CHARITABLE BEQUEST.—See LEGACY 1.

## CHECK.—See BILLS AND NOTES.

## CLOAK-ROOM TICKET.—See BAILMENT.

## CONDITION.—See CONTRACT; SALE; STATUTE OF FRAUDS, 3.

## CONDITIONS ON TICKET.—See BAILMENT.

## CONSIDERATION.

J., a widower, on his second marriage, assigned leasehold property to trustees in trust for himself for life, remainder to his son by his former marriage, and afterwards

sold the same leasehold to plaintiff. The latter applied to have the settlement declared voluntary, under 27 Eliz. c. 4, and consequently void. *Held*, that it was a conveyance for consideration, inasmuch as the lease might have been one which it was worth while to get rid of.—*Price v. Jenkins*, 5 Ch. D. 619.

See SETTLEMENT; STATUTE OF FRAUDS, 1.

## CONSTRUCTION.

1. By Act of Parliament, coal-mining companies have power to make rules by which persons employed in and about the works shall be governed. The H. mine had a regulation that workmen could discharge themselves at a moment's notice, and another by which no one "employed in and about the works" could ascend the pit except with the permission of the hooker-on, or before two o'clock of the afternoon turn. The respondents discharged themselves at eight o'clock in the morning, and against the orders of the hooker-on ascended at one o'clock. *Held*, that they could be convicted of a violation of the special rule in spite of having discharged themselves.—*Higham v. Wright et al.* 2 C. P. D. 397.

2. 10 Vict. c. 15. § 6, authorizes certain gas companies to lay down their pipes in the street, and § 7 provides that "nothing herein shall authorize" them "to lay down or place any pipe . . . into, through, or against any building or in any land, not dedicated to the public use, without the consent of the owners or occupiers thereof." Certain arches of masonry, under a road which ran by the plaintiff's premises, used by him for storage purposes, were broken into and damaged by a gas company, in laying pipes. *Held*, that the arches were "buildings" within the meaning of the Act.—*Thompson v. The Sunderland Gas Company*, 2 Ex. D. 429.

3. Authority to trustees in a will to invest in "funds of the Government of the United States of America, or of the Government of France, or any other foreign Government," held to justify investment in New York, Ohio, and Georgia Bonds.—*Cadet v. Earle*, 5 Ch. D. 710.

See BEQUEST, 1, 2; CONTRACT; INSURANCE, 1; JURISDICTION, 1; LANDLORD AND TENANT, 2; POWER, WILL, 1, 2.

## CONTRACT.

Contract by defendants to buy from plaintiffs 600 tons of rice, to be "shipped" at Madras, in the months of March and April, 1874, per ship *Rajah*. 7,120 bags of the rice were put on board the *Rajah* between the 23d and 25th of February, and three bills of lading therefor were signed in February. Of the remaining 1,080 bags, 1,030 were put on board February 28, and the rest March 3; and the bill of lading for 1,080 bags bore the latter date. There was evidence that the rice put on board in February was as good as that put on board in March or April. *Held*, that the contract had not been complied with, and the defendants

## DIGEST OF ENGLISH LAW REPORTS.

were not bound to accept the rice.—*Bowes v. Shand*, 2 App. Cas. 455; s. c. 1 Q. B. D. 470; 2 Q. B. D. 112; 11 Am. Law Rev. 279, 689.

See SALE.

CONTRIBUTION.—See INSURANCE, 2.

CONTRIBUTORY NEGLIGENCE.—See NEGLIGENCE, 2.

CONVEYANCE.—See VENDOR AND PURCHASER.

COVENANT.—See LEASE 1.

COVERTURE.—See HUSBAND AND WIFE, 1, 2.

DAMAGES.—See INJUNCTION, 1; STATUTE.

DAMAGES, MEASURE OF.—See MEASURE OF DAMAGES.

DEBT.—See BEQUEST, 2; LEGACY, 2.

DECREE NISI.—See HUSBAND AND WIFE, 1.

DETINUE.

W. hired a mare of D., and neglected to return her on demand of D. D. sued him in detinue, and got judgment. W. still neglected to return the mare, and Dec. 6 he filed a liquidation petition. Later in the day, D. had his costs in the detinue suit taxed, and at the same time had notice of W.'s petition. Subsequently he got execution, and, finding the mare, had the sheriff seize her under a *f. fa.* *Held*, that D. was entitled to the mare.—*Ex parte Drake. In Re Ware*, 5 Ch. D. 866.

DISCRETION.—See EXECUTORS AND ADMINISTRATORS.

DIVORCE.—See HUSBAND AND WIFE, 1.

DOMESTIC RELATIONS.—See HUSBAND AND WIFE.

DONATIO CAUSA MORTIS.—See BILLS AND NOTES.

EQUITABLE CHARGE.

A. consigned coffee to M., L., & Co., and drew bills on them at ninety days, payable to the order of B., who negotiated them to the plaintiff R. M., L., & Co. refused to accept the bills, and plaintiff had them protested, and held them for maturity. There was nothing on the bills to show that they were drawn against any particular consignment. A., hearing of the refusal to accept, wrote to S., June 17, 1874, asking him to take charge of the consignment, realize on it, get from M., L., & Co. the names of the holders of the bills, honour the bills, and, if they were not sufficient in amount, to telegraph for the balance; and, in general, to conduct the matter so that A.'s reputation would not suffer. The bills became due Aug. 15, and, the day before, S. wrote to R., giving the amount of the bills, and saying, "Please take notice that I expect to receive from M., L., & Co., early next week, delivery of the coffee sent by drawer against the above, and that I will then again write you on this subject." Aug. 17, S. got the warrants for the coffee from M., L., & Co., and wrote to R. to that effect, referring to his letter of Aug. 14, and saying he should

dispose of the coffee as instructed by A., and in due time would send R. further particulars. The same day, M., L., & Co. attached the coffee in an action in the Lord Mayor's Court against E., A., & Co., who, they alleged, and had been informed by A. had an interest in the coffee, but whom S. had had no dealings with. S. gave R. notice of the proceedings, and the latter filed his bill against A., S., and M., L., & Co., to have the coffee declared specifically appropriated to satisfy the said bills, and for an injunction. *Held*, reversing the decision of HALL, V. C., that A. had given S. authority to create an equitable charge on the goods, and that S. had acted upon that authority, and that R. could therefore maintain the suit.—*Ranken v. Alfaro*, 5 Ch. D. 786.

ESTOPPEL.—See LANDLORD AND TENANT, 1.

EVIDENCE.

1. April 16, 1874, the respondent brought an action against the appellants on a policy of insurance of one N., dated Sept. 28, 1863. N. disappeared in May, 1867, and a sister and brother-in-law testified that none of his family had heard any thing of him since that time, but his niece said she had seen him in December, 1872, or January, 1873, when she was standing in a crowded street in Melbourne; that she started or turned to speak to him, but before she could do so he was lost in the crowd. She had told this circumstance to N.'s other relations. The jury informed the court that they did not consider this evidence conclusive that she had seen N. Counsel for plaintiff asked the court to instruct the jury "that there was evidence that N. had been absent seven years without being heard of, and that he had not been heard of if" the niece "was mistaken in believing that she had seen him;" and if the jury thought she was mistaken, then N. might be presumed dead, having been absent more than seven years without being heard of. This was refused, and the court instructed the jury, *inter alia*, as follows: "You cannot say that a man has never been heard of, when in the first place one of his nearest relations says she saw him . . . within three years; still less . . . when every member of the family states that they heard" so. "You cannot have any one called who saw him die or saw him buried. You have therefore no direct evidence except that he was alive three years ago. . . . You have no evidence whatever upon which you could found the presumption that he is dead, that is, that he has never been heard of by any of his relatives for the space of seven years, when you find that every one of the relatives heard that he was alive." The court added that the presumption of death was removed by the most positive evidence, and finally: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove directly the contrary, and in

## DIGEST OF ENGLISH LAW REPORTS.

the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendant." *Held*, by the Court of Appeal a misdirection, and on appeal to the House of Lords the Lords were divided, and the holding of the Court of Appeal remained undisturbed.—*Prudential Ins. Co. v. Edmonds*, 2 App. Cas. 487.

2. By the Bastardy Laws Amendment Act, 1872, §4, if the statement of the mother as to the paternity of the child be "corroborated in some material particular by other evidence," the man charged with the paternity may be adjudged to be the putative father. *Held*, under this provision, that evidence of acts of familiarity between the parties amounted to such corroboration, and should be received, although such acts took place at a time before the child could have been begotten.—*Cole v. Manning*, 2 Q. B. D. 611.

See FALSE PRETENCES; LANDLORD AND TENANT 1; MORTGAGE; NEGLIGENCE, 1.

## EXECUTORS AND ADMINISTRATORS.

Bequest of personal property to executors to divide it equally among four persons. A part of the property was at testator's death in three second mortgage bonds of the Atlantic and Great Western Railway Company of America, of uncertain value and rapidly failing. At that time they were worth £153 each. They rapidly fell until fifteen months afterwards two of them were sold for £52 each, and the one remaining unsold was worth at the time of the suit £20. One of the legatees had urged the executors to dispose of the bonds earlier, but the executors said they held them in the honest expectation that they would rise. *Held*, that the executors could not be required to make good the loss.—*Marsden v. Kent*, 5 Ch. D. 598.

## FALSE PRETENCES.

Case stated on the conviction of one C. for falsely pretending that he was a responsible dealer in potatoes, and had credit as such, whereby one G. was induced to forward him large quantities of potatoes. The evidence consisted of the following letter from C. to G.: "Sir,—Please send me one truck regents and one rocks as samples, at your prices named in your letter; let them be of good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. P. S. I may say if you use me well, I shall be a good customer. An answer will oblige, saying when they are put on." *Held*, that the conviction was correct.—*The Queen v. Cooper*, 2 Q. B. D. 510.

FIRE INSURANCE.—See INSURANCE, 2.

FOREIGN GOVERNMENT.—See CONSTRUCTION, 3; JURISDICTION, 2.

## FORFEITURE.

In a notice by the secretary of a company to a shareholder to pay an overdue call

or assessment, the latter was notified to pay the call with five per cent interest from the day when the call was voted, or he would forfeit his stock; whereas the rules of the company prescribed interest in such cases only from the day when the call became payable. *Held*, that such notice was invalid, and no forfeiture took place.—*Johnson v. Lytle's Iron Agency*, 5 Ch. D. 687.

FRAUDS, STATUTE OF.—See STATUTE OF FRAUDS.

## HUSBAND AND WIFE.

1. After a decree nisi for divorce from her husband obtained by the plaintiff, the defendant seized and took divers goods as the property of the plaintiff. Afterward the decree nisi was made absolute, and the plaintiff subsequently brought this action for illegal seizure of the goods. *Held*, that the plea of coverture of plaintiff pleaded by defendant was proved.—*Norman v. Villars*, 2 Ex. D. 359.

2. O. was a clothier, and lived with his mother, but owned another house near by, where in 1855 he installed the defendant as housekeeper, and soon after engaged to marry her. In 1861, she began on a small scale the business of fruit preserving. The business gradually increased until it became a large wholesale business. In 1874, O. married her, and went to live with her in the house she had occupied. She had carried on the business before the marriage entirely as her own, with her own means, and kept her own bank account, and at the date of the marriage she had over £1,500 on deposit. The husband's account at the same bank was overdrawn, and without his knowledge she drew from her account and deposited the amount to his to make good the deficit. After the marriage she continued to carry on the business in her maiden name as before, and he did not in any way interfere with it, but always referred customers to her. He died intestate, and she claimed the business as her own; but his sister applied for administration on it as his. *Held*, that the widow was entitled to the whole capital and stock in trade of the business as her own.—*Ashworth v. Outram*, 5 Ch. 923.

See SETTLEMENT.

INFANT.—See LEGACY, 3.

## INJUNCTION.

1. In a suit by one riparian proprietor against another farther up the stream for polluting it to the injury of the plaintiff, an injunction was asked for and also an inquiry as to damages. The defendant claimed that only damages should be awarded as in the case of obstruction of light and air. An injunction was granted.—*Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769.

2. 18 and 19 Vict. c. 128, § 9, forbids burials within one hundred yards of a dwelling-house. The plaintiff applied for an injunction to restrain the defendant from using a field, or any part thereof as a cemetery, some portion of which field was within one hundred yards of plaintiff's dwelling. It

## DIGEST OF ENGLISH LAW REPORTS.

appeared that, in 1865, defendant obtained from the Secretary of State permission so to use his field, but had not been able to act on the permission; that he had recently tried to form a company for the purpose, but had failed; that he did not intend to use any of the land within one hundred yards for burials without the plaintiff's consent; that he had offered to give two months' notice to defendant whenever he proposed to act at all in the matter; and that the defendant had offered to suspend proceedings if the plaintiff would agree not to use any of the field for a cemetery. *BACON, V. C.*, granted a temporary injunction. *Held*, that the injunction must be dissolved.—*Lord Cowley v. Byas*, 5 Ch. D. 944.

See TRADEMARK.

## INSURANCE.

1. Under a policy on "commission and profit" on "ship and ships, steamer and steamers," occurred the clause: "Warranted free from all average, and without benefit of salvage, but to pay loss on such part as shall not arrive." The "commission and profit" referred to was that on goods shipped on a British ship. By 19 Geo. II. c. 27, § 1, it is provided that "no assurance . . . shall be made . . . on any ship . . . belonging to his Majesty or any of his subjects, or on any goods . . . on such ship, . . . interest or no interest, . . . or without benefit of salvage to the assurer: and every such assurance shall be null and void." *Held*, that under this statute the assured on the above policy could recover neither for the loss nor the premium paid. *Alkins et al. v. Jupe*, 2 C. P. D. 375.

2. B. & Co., wharfingers, effected insurance with the plaintiff and the defendant company by "floating" policies, on grain and seed belonging to R. & Co. and stored with B. & Co. R. & Co. also effected insurance on the same property with the plaintiff company. All the policies contained this condition: "If at the time of any loss or damage by fire, . . . there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, . . . this company shall not be liable to pay or contribute more than its ratable proportion of such loss or damage." There were also the usual conditions of average in all the policies. B. & Co., by the custom of London, were responsible for the goods to the owners as though common carriers. By a fire on their wharf, grain belonging to R. & Co., among other grain, was destroyed. B. & Co. were paid in full on their policies, and this suit was brought to fix the liability of the companies among themselves. *Held*, that the underwriters on the policies procured by B. & Co. were not liable to contribute.—*North British Mercantile Ins. Co. v. London, Liverpool, & Globe Ins. Co.*, 5 Ch. D. 569.

3. The defendant was underwriter for £1,200 on plaintiff's ship, valued in the policy at £2,600. The cost of repairing cer-

tain damage by sea was, after deducting one-third new for old and some particular average charges, £3,178 11s. 7d., and the salvage and general average charges paid by plaintiff were £519. The agreed value of the ship when insured was £3,000, when damaged, £998, after repairs, £7,000; which last sum was, even after deducting the cost of certain new work not charged against the underwriter, much more than the original value of the ship. *Held*, that the liability of the underwriter was to be measured by the cost of repairs, even though thereby he might be liable for more than a total loss with benefit of salvage.—*Lohre v. Aitchison*, 2 Q. B. D. 501.

INTENTION.—See MORTGAGE.

## JURISDICTION.

1. The Admiralty Jurisdiction Act (24 Vict. c. 10, § 7) enacts that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." This action was brought by the widow of a mariner, killed in the collision between the steamer *Strathclyde* and the German ship *Franconia* in the straits of Dover, and for which the ship was to blame. *Held*, on appeal, that the Admiralty Court had jurisdiction in a case of damage for loss of life, under the Act.—*The Franconia*, 2 P. D. 163.

2. The Republic of Peru issued bonds for the payment of which were pledged the customs dues of the republic, the national credit thereof, with the hypothecation of all its real property, certain railways, and especially the surplus proceeds of all the guano imported into Great Britain and the United States each half year, until the interests and payments on the bonds for that half-year were satisfied. There was default in the payment of the interest, and the plaintiff, holder of the bonds, brought suit against the defendants, agents of the Peruvian government, to compel the latter to apply the proceeds of guano held by them to the payment of the interests and the amortization of the bonds. The defendants alleged a lien of their own on the guano in their hands. Plaintiff offered to make the government of Peru a party, but the latter laid no claim in any way to the property in the hands of the defendants. Defendant demurred, on the ground that the Court had no jurisdiction, inasmuch as the defendants were mere agents of Peru, and the latter was a necessary party. Demurrer held good.—*Twycross v. Dreyfus*, 5 Ch. D. 605.

## LANDLORD AND TENANT.

1. Plaintiffs let a house to the defendant for seven years from Lady Day, 1868. Defendant entered and occupied till the autumn of 1868, when he left for America, leaving the key with an agent with orders to dispose of the premises, if possible, or to make the best terms he could with the plaintiffs for a surrender. The agent gave up the keys to the plaintiffs in December, 1868. At the beginning of 1869, notices that the

## DIGEST OF ENGLISH LAW REPORTS.

house was to let appeared in the windows, by plaintiffs' authority, and they attempted to let the house; and, during 1870, some of the plaintiffs' workmen in their business occupied the house part of the time. In March, 1872, the house was let, and plaintiffs brought action for the rent up to that time. *Held*, that there was no evidence of a surrender of the defendant's lease by operation of law.—*Oastler v. Henderson*, 2 Q. B. D. 575.

2. Document signed by plaintiff and defendant, as follows: "Jan. 26. Hand agrees to let, and Hall agrees to take, the large room, &c., from 14th February next until the following Midsummer twelvemonths, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more." *Held*, reversing the decision of the Exchequer Division, that the contract must be divided, and that it contained an actual demise, with a stipulation superadded that the tenancy should on notice be renewed for three years and a half at the tenant's option.—*Hand v. Hall*, 2 Ex. D. 355; s. c. 2 Ex. D. 318.

3. The defendant let F. a house under a lease by which F. was to do all the repairs, with certain exceptions. The house was, at the time of the lease, in good repair, and the lease contained no stipulation that defendant should do any repairs. During the tenancy, owing to a portion of the house included in the exceptions being out of repair, a chimney-pot fell on the head of plaintiff, who was a servant of F., and injured him. *Held*, that he could not recover of the defendant.—*Nelson v. The Liverpool Brewery Co.*, 2 C. P. D. 311.

## See LEASE 2.

## LEASE.

1. B. conveyed an eating-house in lease, and covenanted that he would not let any house in that street "for the purpose of an eating-house;" but it was provided that the covenant should not bind B.'s heirs or assigns. He then let another house in the street, and the lessee covenanted with him that he would not carry on any business there without a license from B. Both leases were assigned, and the assignee of the first brought suit against the assignee of the second and B., to restrain them respectively from carrying on or allowing to be carried on the business of an eating-house. *Held*, that B.'s covenant was not broken, and the assignee of the second lease could not be restrained.—*Kemp v. Bird*, 5 Ch. D. 974; s. c. 5 Ch. D. 549.

2. A lessee covenanted to make repairs, upon six months' notice. Notice was duly given Oct. 22, 1874, and the lessee replied asking if the lessor would purchase the short leasehold interest remaining. The lessor replied, asking the price; and the lessee answered, giving it. Dec. 31, 1874, the lessor replied that, having regard to the condition of the leased premises, the price

was too high, and asked a reconsideration of the question of price; and stated that he should be glad to receive a modified proposal. In January, 1875, the lessor wrote the lessee, asking for the rent, and made some inquiry arising out of their relations. The lessee replied, giving the information. April 13, 1875, the lessor wrote the lessee, saying the time for repairs would expire April 21, 1875. The repairs were completed about June 15, 1875. April 28, the lessor began an action of ejectment for failure to repair according to the covenant. *Held*, that the lessee was entitled to equitable relief from forfeiture, on the ground that the negotiations following the original notice to repair had the effect of suspending the operation of that notice till Dec. 31, from which time the lessee had, accordingly, six months to repair.—*Hughes v. The Metropolitan Railway Co.*, 2 App. Cas. 439; s. c. 1 C. P. D. 120.

See LANDLORD AND TENANT, 1, 2.

## LEGACY.

1. Testator left a fund in trust to keep in repair a certain tomb, and, when the surplus income reached £25, to pay the balance above £20, from time to time, for the relief of three poor persons in each of the parishes of C. and S. *Held*, that, as the provision about the tomb was void, the whole income should be applied to the second object.—*In re Williams*, 5 Chan. D. 735.

2. A testator, after certain specific bequests, proceeded: "I direct that my . . . debts, including a debt of £300 owing from me to my daughter Jane, be paid." He owed his daughter Jane only £150. *Held*, that an intention to make Jane a bequest could not be understood, and that she was not entitled to the other £150.—*Wilson v. Morley*, 5 Ch. D. 776.

3. 23 & 24 Vict. c. 145 § 26, provides that, where property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, it shall be lawful for the trustees to apply towards his maintenance or education "the whole or any part of the income to which such infant may be entitled in respect of such property." Testator left property in trust to pay his daughters, while under age and unmarried, £50, each, yearly, and to his sons (except the eldest), while under twenty-one, a like sum; and to accumulate the surplus to become part of his residuary estate. He gave £4,000 to each of his sons (except the eldest), when they should become twenty-one, and a like sum to each of his daughters, when they should become twenty-one or marry. He made his eldest son residuary legatee. *Held*, reversing the decision of *HALL, V. C.*, that the legacies to the daughters bore no interest till they were due, and that, therefore, neither at common law or under the statute could the trustee be ordered to apply any of the income from said legacies to the support of the daughters under age, even though

## DIGEST OF ENGLISH LAW REPORTS.

the £50 given for that purpose was insufficient.—*In re George (an Infant)*, 5 Ch. D. 837.

See BEQUEST 1

LIFE ESTATE.—See WILL, 2.

LIFE INSURANCE.—See EVIDENCE 1.

LIMITATIONS. STATUTE OF.—See STATUTE OF LIMITATIONS.

MARINE INSURANCE.—See INSURANCE.

MARRIED WOMAN'S PROPERTY ACT.—See HUSBAND AND WIFE, 2.

MASTER AND SERVANT.

1. The defendant's servant, with his master's horse and waggon, was employed to take out beer for defendant to customers, and on his way home he called for empty casks, for which on delivery to his master he received 1d. apiece. On March 5, 1875, he took the horse and waggon, without his master's knowledge, and carried a child's coffin to a relative's house. On his way home he picked up a couple of empty casks, and subsequently negligently came in contact with the plaintiff's cab, and damaged it. On his arrival home, he received his usual fee for the empty casks. *Held*, that he was not in the discharge of his ordinary duties when the injury happened, and the master was not liable.—*Rayner v. Mitchell*, 2 C. P. D. 357.

2. The plaintiff was employed by a contractor, engaged by the defendants to do certain work on their road, in a dark tunnel on a curve, where trains were passing at full speed without any signal every ten minutes, and the workmen could not know of the approach of the train until it was within thirty yards of them. There was just room enough between the rail and the wall for the men to get out of the way. No look-out was stationed, though it appeared that, on a previous occasion, when repairs were going on, there had been one. Plaintiff had worked in this place a fortnight, and, while reaching out across the track for a tool, he was struck and hurt by a train of defendants. The jury found negligence in defendants, and awarded £300 damages. *Held*, on appeal (MELLISH and BAGGALLAY, L.JJ. dissenting), reversing the decision of the Court of Exchequer, that the plaintiff must be held to have been aware of the extraordinary risk he was running, and the defendants were not liable for injury resulting from his voluntary exposure.—*Woodley v. The Metropolitan District Railway Co.*, 2 Ex. D. 384.

See CONSTRUCTION, 1; NEGLIGENCE, 1.

MISDIRECTION.—See EVIDENCE, 1.

MORTGAGE.

A., a first mortgagee, and plaintiff in this suit, foreclosed, making the mortgagor and N., the second mortgagee, parties. Subsequently, the mortgagor went into bankruptcy, and A. purchased the equity from the trustee. The trustee assigned the mortgaged property to A. "in consideration of

£1,380, retained by the said" A. "in full satisfaction of the said sum" due, and of £20 paid the trustee by A., subject to the aforesaid claim of the said" N. The value of the property was not more than £1,380; and N. claimed that the effect of the above transaction was to extinguish A.'s claim, and to let in his own second mortgage as a first encumbrance on the property in A.'s hands. *Held*, that there was a plain intention to keep the first incumbrance alive, and that N. could not be let in. *Toulmin v. Steere* (3 Mer. 210), distinguished. *Held* also, by HALL, V.C., that a correspondence between the solicitors of A. and the trustee, concerning the purchase, was admissible as evidence as to the intention to keep alive A.'s mortgage.—*Adams v. Angell*, 5 Ch. D. 634.

NEGLIGENCE.

1. The defendant, Cox, was the owner of premises on which he contracted with the other defendants to build a house. The outside of the house was finished, and the scaffolding which had been erected to protect the public on the sidewalk had been taken down. The servant of a sub-contractor employed to plaster the interior, moved a tool too near the edge of a plank before an open window, and the tool fell out and hurt the plaintiff passing under. The jury found that the scaffolding was properly removed, but found the defendant contractors negligent in not putting up some other protection and found for the plaintiff. *Held*, that the defendants were not liable, the accident not being one which they could have foreseen. *Semble* that, if anybody, the sub-contractor was liable.—*Pearsons v. Cox et al.*, 2 C. P. D. 369.

2. The plaintiff, a waterman looking for work, saw a barge belonging to defendant being unlawfully navigated on the Thames, by one man alone, and remonstrated with the man in charge of it, hoping thereby to be employed to assist. The latter referred him to defendant's foreman, and plaintiff went to defendant's wharf about the matter. While there, a bale of goods fell upon him through the negligence of defendant's servants, and injured him. *Held*, that the plaintiff could maintain an action for injuries.—*White v. France*, 2 C. P. D. 308.

See LANDLORD AND TENANT, 3; MASTER AND SERVANT, 1, 2.

NOTICE.—See FORFEITURE, 1; LEASE, 2.

OBSCENE PUBLICATION.—See PLEADING AND PRACTICE.

PARTIAL LOSS.—See INSURANCE, 3.

PARTIES.—See COPYHOLD.

PATENT.

The licensee under a patent cannot call in question the validity of the patent during his license, but he may show that the matters in respect of which royalties are claimed of him by the patentee are not covered by the patent, after the analogy of a tenant, who, though he may not impeach his land-

## DIGEST OF ENGLISH LAW REPORTS.

lord's title, may nevertheless show that a particular piece of land, which he claims, is not comprehended in the lease, but is his under another title.—*Clark v. Adie*, 2 App. Cas. 423.

See TRADEMARK.

PERSONAL COVENANT.—See LEASE, 1.

PLEADING AND PRACTICE.

In an indictment for publishing an obscene book, the title only was set forth. The jury found the book obscene, and the defendants moved to quash the indictment, or to arrest judgment, on the ground that the exact words relied on, that is, the whole book should have been set forth. Motion refused, with an intimation that the point, being a doubtful one, might, however, well be taken in error.—*The Queen v. Bradlaugh and Besant*, 2 Q. B. D. 569.

See HUSBAND AND WIFE, 1; INJUNCTION, 2.

POSSESSION.—See STATUTE OF FRAUDS, 1.

POWER.

Testatrix made a bequest to her daughter for life and at her death, "upon trust to pay and apply all the trust moneys, and to assign and transfer the security and stock, in and upon which the same shall be then invested, to and amongst my other children, or their issue, in such parts, shares and proportions, manner and form, as my said daughter . . . shall by deed or will direct, limit, and appoint." *Held* that, under this clause the power was exclusive and not merely distributive, and the daughter could appoint to a part only of the other children, if she saw fit.—*In re Veale's Trusts*, 5 Ch. D. 622.

PRACTICE.—See PLEADING AND PRACTICE.

PRESUMPTION OF DEATH.—See EVIDENCE, 1.

PROXY.

Bankruptcy Rules, 1870, r. 85, provides that the instrument appointing a proxy shall be under the hand of the creditor, and in the form given in the schedule to the rules. That form is as follows: "I appoint C. D., of, &c., my proxy in the above matter." A creditor gave his solicitor a blank proxy duly signed, and the solicitor filled in his own name, and undertook to act under the proxy. *Held*, reversing the opinion of BACON, C. J., that the proxy was good.—*Ex parte Lancaster*. *In re Lancaster*, 5 Ch. D. 911.

RAILWAY.—See BAILMENT; MASTER AND SERVANT, 2.

REALTY AND PERSONALTY.—See TRUST, 1.

RENT.—See STATUTE OF LIMITATIONS.

RIPARIAN PROPRIETOR.—See INJUNCTION, 1.

SALE.

July 6, 1876, the defendants, auctioneers, sold to the plaintiff, by auction, the reversion in certain stock expectant on the decease of a married lady (then in her forty-fourth year, and childless), without issue who should attain the age of twenty one. The conditions of sale were that the purchaser should pay a deposit of 20 per cent., and sign agree-

ments to pay the balance on or before Aug. 17, when the sale would be completed; "but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchasers are (but without prejudice, nevertheless, to the vendor's rights under the seventh or any other condition of sale) to pay interest on the balance . . . until the completion of the purchase." The seventh condition provided that, if the purchaser should fail to comply with any condition of the sale, he should forfeit his deposit; the vendor might resell the property, and the defaulting purchaser be liable to make good any loss. The defendants could not complete the sale by Aug. 17, but became able the last of November, and offered to complete it. Meanwhile, Aug. 19 plaintiff sued for the recovery of his deposit. *Held*, that time was not of the essence of the contract, and plaintiff could not recover.—*Patrick v. Milner et al.*, 1 C. P. D. 342.

SECURITY.—See SET-OFF.

SET-OFF.

A party having collateral security for his debt against a bankrupt, may still set off against a claim due the bankrupt estate from him.—*McKinnon v. Armstrong Brothers*, 2 App. Cas. 531.

SETTLEMENT.

Real estate was devised to a woman, with an expression of wish that, in case she should marry, she should, before marrying, settle the estate for her own use for life, and to such uses as she should by will and notwithstanding coverture appoint. She married and had a child, and subsequently joined with her husband in a deed, purporting to be in execution of said wish, whereby said estate was settled upon certain trusts for her, her husband, and their children. Subsequently, the husband and wife mortgaged the estate, without informing the mortgagee of the settlement. *Held*, that the settlement was for good consideration, and not void against the mortgagee, under 27 Eliz. c. 4.—*Teadale v. Brailhwait*, 5 Ch. D. 85.

SHIPPING AND ADMIRALTY.—See BILL OF LADING; INSURANCE, 1, 3; JURISDICTION, 1.

SOLICITOR.

Under the special circumstances of this case, a solicitor, with a retainer to act generally for his clients, was allowed to charge for his professional services and expenses on journeys to America and to Paris, not undertaken primarily for these clients, or under their special instructions, but on which he got information which they afterwards made use of in their matters conducted by him.—*In re Snell*, 5 Ch. D. 815.

SPECIFIC CHARGE.—See EQUITABLE CHARGE.

SPECIFIC PERFORMANCE.—See STATUTE OF FRAUDS, 1.

STATUTE.

The principle appearing to have been laid down in *Couch v. Steel*, (3 E. & B. 402), that,



## DIGEST OF ENGLISH LAW REPORTS.

wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can bring an action for damage, against the person on whom the duty is imposed, questioned by all the judges in *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441.

See CONSTRUCTION, 1, 2; EVIDENCE, 2; FORFEITURE, 2; INSURANCE, 1; JURISDICTION, 1; LEGACY, 3; PROXY.

## STATUTE OF FRAUDS.

1. K. informed his daughter and her intended husband that he had bought a house which should, in the event of the marriage, be his wedding present to his daughter. After the marriage, the daughter and her husband entered into possession of the house, a lease of which K. had bought, subject to payment of certain instalments. K. paid all instalments which fell due in his lifetime, and died leaving a sum of £110 still to be paid, which fell due after his death. *Held*, that possession following K.'s verbal promise took the promise out of the Statute of Frauds; and that K.'s agreement was to give a house free from encumbrances, and that, therefore, £110 must be paid out of K.'s estate.—*Ungley v. Ungley*, 5 Ch. D. 387; s. c. 4 Ch. D. 73; 11 Am. Law Rev. 503.

2. In a contract for the purchase and sale of land, the vendor was mentioned only as a "trustee, selling under a trust for sale." *Held*, sufficient under the Statute of Frauds.—*Cutling v. King*, 5 Ch. D. 660.

3. Eight persons made an agreement to convey certain land to two of their number, by an absolute deed, and that they should sell the same lots, and hold the proceeds in trust for the eight. The defendant, in April, 1875, made a verbal offer to W., agent of the owners for the sale of the lots, for some of them. W. told him that he must purchase subject to certain conditions, printed on a plan of the lands, and which W. made known to him. The last condition was to the effect that each purchaser should sign a contract embodying the conditions, and the payment of a deposit and the completion of the purchase within two months from the date of the contract. W. promised to lay the offer before the "proprietors," had accepted his offer, and inquiring about his wishes as to the title. The next day defendant replied that, unless he was at liberty to build or not, the offer had better be reconsidered. The next day W. answered, saying the acceptance was an unconditional one, and defendant could do as he pleased about building. Soon after, the defendant wrote, declining to go on. In a suit for performance, *held*, that the use of the word "proprietors" sufficiently designated the vendors to satisfy the Statute of Frauds, but that the signing of the contract, as required in the printed conditions, constituted a condition precedent to the completion of the contract, and therefore the defendant was not bound.—*Rossiter v. Miller*, 5 Ch. D. 648.

## STATUTE OF LIMITATIONS.

In 1812, land subject to a fee-farm rent was conveyed to the predecessor in title of the plaintiff: but down to 1872, the grantor's successors continued to pay the fee-farm rent. In 1872, the grantor's successor refused to pay the rent, and the defendant, who was entitled to the rent, and who was before ignorant that the property had changed hands, demanded the rent of the plaintiff, and, on her refusal to pay, he distrained, and she then brought suit in replevin, and set up the Statute of Limitations, 3 & 4 of Will. IV., c. 27, §§ 2 & 3, since the payments had not been made by the tenant for more than twenty years. *Held*, that the case did not come within the Statute.—*Adnam v. The Earl of Sandwich*, 2 Q. B. D. 485.

SUB-CONTRACTOR.—See MASTER AND SERVANT, 2; NEGLIGENCE, 1.

SURRENDER.—See LANDLORD AND TENANT, 1.

TICKET.—See BAILMENT.

TIME.—See SALE.

## TRADEMARK.

In 1862, S. C. got a patent for a filter, in the name of himself and his son G. C., that plaintiff, then a minor. S. C. died the same year, and G. C. carried on the business and sold filters with the label, "S. C.'s Improved Patent Gold Medal Self-cleansing Rapid Water-Filters." In 1865, the patent ran out, and in 1867 the plaintiff, then of age, altered his label, by inserting in it in place of "S. C.'s," "G. C.'s," and placing over it a medallion with the words "By Her Majesty's Royal Letters Patent." In 1876, the defendants' relatives and former employees of the plaintiff, began in the same town making filters very much like plaintiff's, but with a label thus: "S. C.'s Patent Prize Medal Self-cleansing Rapid Water Filters, Improved and Manufactured by W. & Co." *Held*, dissolving an injunction granted by BACON, V. C., that the label was not a trademark, but a description only, that the defendants' label was not a fraudulent imitation of plaintiff's designed to cheat the public, and that the plaintiff could have no standing in court by reason of the fraudulent representation on his label that the patent was still subsisting.—*Cheavin v. Walker*, 5 Ch. D. 850.

## TRUST.

1. Testator appointed real estate to N. subject to a term of years, vested in trustees, who were directed to raise a sum of money therefrom and to pay the income of it to certain life-tenants. This was done, and on the death of the life-tenants, who all survived N., *held*, that the personal representative of N. was entitled to the principal of the fund.—*In re Newberry's Trust*, 5 Ch. D. 746.

2. The principle enunciated and applied that all benefits derived by trustees from the trust-property accrue to the *cestui que trust*, even though the benefit was secured

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

by the trustees appearing as actual owners ; and that, in case of breach of trust by trustees for their own benefit, no lapse of time can validate the transaction.—*Aberdeen Town Council v. Aberdeen University*, 2 App. Cas. 544.

See SETTLEMENT.

## VENDOR AND PURCHASER.

Trustees for the sale of a freehold stipulated that "the property is sold and will be conveyed subject to all free rents, quit-rents, and incidents of tenure, and to all rights of way, . . . and all rights and claims, of what kind and nature soever (if any) of the tenants, without any obligation on the part of the vendors to define any such rights or claims." *Held*, that they were entitled to have these words inserted in the *habendum* of the deed, although they had not shown that any liability of the sort existed.—*Gale v. Niquier*, 5 Ch. 625.

See STATUTE OF FRAUDS, 2, 3.

## VOLUNTARY CONVEYANCE.—See CONSIDERATION.

## WILL.

1. A testator, after directing his trustees to convert his estate into money and pay his debts and legacies, proceeded : "And I declare that the said trustees may vary the said . . . funds . . . at their discretion, and shall pay the moneys and the investment for the time being representing the same, to my said wife during her life upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one years ; or, being daughters or a daughter, shall attain that age or marry, and if more than one, in equal shares. Provided also, that the said trustees may after the death of my said wife, or previously thereto, if she shall so direct in writing, raise any part not exceeding one-half part of the then expectant presumptive or vested share" of any child for his or her advancement. The trustees were empowered to use the income "after the death of" the wife for the maintenance of the children. If no child survived him, and, being a son, attained the age of twenty-one years or married, then the trust fund should go to testator's brothers and sisters. *Held*, that the widow took a life interest in the fund.—*Greenwood v. Greenwood*, 5 Ch. D. 954.

2. Testator gave to his executors named all his property in trust to pay his debts, legacies, and bequests, with power to convert the whole or any part. He gave some legacies, and to his wife £1,500 and all his household goods. Then followed certain other bequests to be paid out of the personal, and certain others to be paid in certain circumstances out of the real estate. He then directed that, in case he died without children (as he did) after the death of his wife the residue of the property should be divided into twelve parts and given to the "children and their descendants" of his aunts, the descendants to take the portion of their parents, and should there be no children or lawful descendants of any of his

aunts remaining at the time these bequests became payable, then the portions so bestowed should be disposed of as part of the residuary fund. Then followed a direction that the trustees or executors need not convert or pay the legacies for two years after his death unless they thought best, and that the "division of the residuary property" need not be made till two years after the death of his wife. Then followed provisions for payment of his wife's annuity of £700, payable to her under their marriage settlement. The testator died in 1837, and the wife in 1876. *Held*, that only the children and grandchildren of the aunts took, and the wife had no life-estate by implication.—*Ralph v. Carrick*, 5 Ch. D. 984.

See BEQUEST, 1, 2 ; CONSTRUCTION, 3 ; LEGACY, 1, 2, 3 ; POWER ; SETTLEMENT.

## WINDING UP.—See COMPANY, 1, 2.

## WORDS.

"Buildings."—See CONSTRUCTION, 2.

"Corroborated in some material particular."—See EVIDENCE, 2.

"Damage done by any Ship."—See JURISDICTION, 1.

"Descendants."—See WILL, 2.

"Employed in and about the Works."—See CONSTRUCTION, 1.

"Foreign Government."—See CONSTRUCTION, 3.

"Never been heard of."—See EVIDENCE, 1.

"Not accountable."—See BILL OF LADING.

"Proprietors."—See STATUTE OF FRAUDS, 3.

"Shipped."—See CONTRACT.

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

There is published in England (by Stevens & Haynes, Bell Yard, Temple Bar), a pamphlet called the *Bar Examination Journal* which answers much the same purpose to the English student that this department of the *Canada Law Journal* does to his Canadian brother. We extract from this pamphlet the Easter Examination papers applicable to our law. The following are the Common Law and Equity questions, with references to the books where the answers may be found :

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

## REAL AND PERSONAL PROPERTY.

*Pass Paper.*

What are the distinctive features of real property and personal property respectively? Why, in the first instance, were leases for years of land considered as personal estate, and titles of honour as real estate? (See Wms. R. P. Intro.)

If lands be given to A. and B. and the heirs of their two bodies, what estates do A. and B. take (1) when they are persons who can, (2) when they are persons who cannot, possibly intermarry? (See Wms. R. P. Pt. I. c. 6.)

A testator in 1870 charged his freehold estate, Blackacre, in aid of his personal estate, with the payment of his debts and of a legacy to his widow, and so charged he devised Blackacre to his son A. in tail male. He devised his freehold estate, Whiteacre, to his son B. in fee, charged with payment of a legacy to each of his daughters C. and D., and he appointed F. his executor. The charges are unsatisfied: A. and B. are both bachelors and desire to sell both estates. Can a good title be made, and who must convey to the purchasers? (See Wms. Pt. I. c. 10.)

A. and B., men, and C., a married woman, being joint tenants of a freehold estate, agree in writing signed by them all, but not acknowledged by C., to sell the estate. Before a conveyance is executed C. dies, what becomes of her share? (See Smith, R. & P. 234; Deane's Principles of Conveyancing, p. 228; *Caldwell v. Fellows*, L. R. 9, Eq. 410.)

Can a married woman exercise without her husband's consent a power over real estate given to her when married? (See Wms. Pt. II. c. 3.)

If a leasehold is bequeathed to A. for life, remainder to B., and the executor assents to the bequest, what becomes of the legal term of years on the death of A? (See *Fearne*, C. R. 402.)

Sketch in outline a conveyance in fee, with all usual covenants, on a purchase from mortgagor and mortgagee of part of the mortgaged property, the purchase-money being paid to the mortgagee in reduction of the debt? (See Davidson, Vol. II. P. I., Prec. XII.)

## COMMON LAW.

*Pass Paper.*

What is the law as to suing on a gaming or wagering contract? Is such a contract illegal? (See Indermaur, Principles of the

Common Law 232, 234; *Hampden v. Walsh*, L. R. 1 Q. B. D. 189.)

Give instances when an executor is and is not liable on a contract made by his testator? (See Indermaur, C. L. 123, 253; 2 Wms. Executors, 7th ed., 1721—1728.)

When is a person indictable for endeavouring to conceal the birth of a child? State the effect of the enactments on this subject? (See Harris, Criminal Law, 174.)

Give instances showing what would and what would not amount to embezzlement? (See Harris, Cr. L. 221, 223; Broom, C. L. 953, 954.)

What is the mode of proceeding at the trial where a person is indicted for larceny, and is charged in the indictment with a previous conviction for felony? (See Archb. Cr. Pl. 327, 18th ed.; Harris, Cr. L. 330.)

When may the Court before whom a prisoner is tried and convicted order that he be subject to the supervision of the police? What is the effect of such an order? (See 34 and 35 Vict. c. 112; Harris, Cr. L. 443.)

## EQUITY.

*Pass Paper.*

Distinguish between (1) an Express Trust, (2) a Constructive Trust, (3) an Implied Trust, (4) a Resulting Trust: and give instances of each? (See *In re Carter's Trusts*, L. R. 14 Eq. 217; Snell, pt. 2, c. 4; Dyer v. Dyer, 1 W. & T. 3rd ed. 184; Smith's Manual, T. 2, c. 5.)

A testator gives all his personal estate to trustees upon trust to permit his widow to reside in his house, and use such parts of his property as she may desire personally to enjoy for her life, and as to all the residue upon trust for his widow for life for her separate use, remainder to his only son for life, remainders over. The testator's estate consists of—(1) A leasehold house, the lease of which has twenty years to run at the time of his death; (2) The household furniture in his house; (3) A cellar full of valuable wine; (4) £10,000 consols; (5) A terminable government annuity, of which twenty years are unexpired at his death; (6) A leasehold farm; (7) £500 Bank of England stock; (8) £1,000 five per cent. debentures of the London and North-Western Railway Company. How ought the trustees to deal with these items respectively? (See *Howe v. Earl of Dartmouth*, 2 W. & T. 3rd ed. 289; Theobald on Wills, 102; Jarman 1. 577; Snell, 2nd ed. 129.)

Distinguish between legal assets and equitable assets. The importance of this

## EXAMINATION QUESTIONS—CORRESPONDENCE.

distinction has lately been considerably diminished. When and how was this effected? (See *In re Poole's estate*, 6 C. D. 739. Wms. Exors, 6th ed. 1557.)

In the absence of special circumstances, when will the plaintiff in an administration suit be entitled to costs as between solicitor and client—

- (a) When the plaintiff sues as a creditor;
  - (b) When the plaintiff sues as a legatee.
- (See *Henderson v. Dodds*, L. R. 2 Eq. 532; *Seton on Decrees*, 3rd ed., 145.)

What is meant by the maxim, "When equities are equal, the law shall prevail?" Illustrate your answer by an example of its application in the administration of an insolvent estate. (See *Snell*, 2nd ed. p. 18.)

Distinguish a lien (strictly so called) from a mortgage and a pledge, and distinguish these from one another. (See *Wms. P. P.*, pt. I. c. 2).

A mortgagee in possession has received rents which in each year were considerably in excess of the interest on his debt. In an action for foreclosure, in what manner will the account be directed—

- (a) When some interest } was in arrear at
  - (b) When no interest } the time when he
- took possession? (See *Seton on Decrees*, 3rd ed. 400; *Fisher on Mortgages*, § 1622 *et seq.*

## CORRESPONDENCE.

*Stop Orders.—Wilson v. McCarthy.*

To the Editors CANADA LAW JOURNAL.

SIRS:—The report of the case of *Wilson v. McCarthy* in the last number of *Chy. Ch. Reports* would seem, to a careful reader, to be rather meagre and unsatisfactory. Overruling, as this case does, a decision which has been followed for many years, I think the grounds upon which the judgment is based are hardly set out with the fulness or accuracy which, in view of the importance of the case, they deserve.

In *Lee v. Bell*, an execution creditor, with writs in the sheriff's hands, petitioned for a stop-order. The Secretary dismissed the application, apparently because he was of opinion that a stop-order upon funds in court of a judgment debtor

could be granted, if at all, only as ancillary to a charging order to be obtained under the provisions of the *Imp. Stat. 1 & 2 Vict. cap. 110*, secs. 13 and 14, from a Judge of the Court in which the judgment was entered: the Act not being in force here, no charging order could be granted, hence no stop-order.

In *McCarthy v. Wilson*, a case for all purposes identical with *Lee v. Bell*, *Proudfoot V.-C.* granted the order. Now although a stop-order is sometimes allowed to go where the more extended remedy of an order for payment out is refused; yet, as a clear title to the property in court must be shewn by the applicant (*Wood v. Vincent*, 4 Beav. 419; *Quarman v. Williams*, 5 Beav. 133; *Lambert v. Hutchinson*, 13 L. J. N. S. Eq. 336), and as the Court has always been extremely jealous that innocent parties with funds in its charge shall not be unnecessarily subjected to the annoyance and expense a stop-order may occasion; and as, moreover, a stop-order is in nearly every instance followed, as a matter of course, by an order for payment out to the person obtaining it of either the interest or corpus of the fund affected, we may not be going too far if we regard the case as practically establishing that a creditor, with writs of execution in force and unsatisfied, may now, without filing a bill, obtain payment from any sum of money in Court to the credit of his debtor.

There is little doubt that the Secretary was right as to the *Statutes 1 & 2 Vict. c. 110* and *3 & 4 Vict. c. 82* not being in force in this country (*Calverly v. Smith*, 3 C. L. J. 67; *Re Lash*, 1 *Chy. Ch.*); and that, consequently, our Courts have no jurisdiction to grant a charging order, the effect of which is simply to place the creditor in the same position as if he had obtained an assignment of the debtor's interest in any stock or

## CORRESPONDENCE.

funds it affects in the Court of Chancery, whereupon the Court in its ordinary jurisdiction (Ayckbourn, 480.) can issue the stop-order. The Secretary's attention appears, however, not to have been called to the fact that although the Act as a whole is not in force here, one very important clause was borrowed from it and enacted by our Legislature; and that clause is precisely the one under which the application was, or should have been, made.

As regards the attaching of property in the trusteeship of the Court of Chancery, the Imp. Statute furnishes two distinct modes of procedure. First (sec. 14) it empowers the judgment creditor at law, without taking out execution, to procure a charging order from a Common Law Judge; and it declares the effect of such order, which is as I have stated it. Or, second (sec. 12), he may take out *fi. fas.*, and direct the sheriff to seize the cheques or funds lying in the Accountant-General's office belonging to his debtor. As a preliminary to this latter, it was thought becoming to ask the leave of the Court, whose officer the Accountant-General is; a possibility moreover existing that a seizure without prior leave obtained might be construed and punished as a contempt, and the seizure nullified. Two distinct classes of cases thus appear in the reports; those decided under the sec. 14, and those under the section 12. With the former we have nothing to do, for the reason above intimated.

The best known cases under the 12 sec., which was passed here in the 20 Vict. c. 57, and is still in the Statute Books (C. L. P. Act.), are those of *Courtoy v. Vincent*, 15 Beav. 487; *Watts v. Jefferyes*, 15 Jur. 435 and 3 Macn. & G. 372 (again reported as *ex parte Reece*, in 16 L. T. 501), and *Robinson v. Wood*, 5 Beav. 388.

In the first and last of these cases a stop-order only issued. In the other a cheque had been made out in the name of the debtor, and remained with the Accountant ready for delivery: the cheque was handed over to the sheriff.

I have been unable to find a reported case where *moneys* were ordered to be paid over by the Accountant to a creditor or to the sheriff. The difficulty in the way of seizing money lying in Court subject to an order for payment out to the debtor but for which no cheque has yet been drawn arises from the fact that it is not altogether clear that before the actual making out of the cheque the money in court "belongs" to the debtor, so as to be seizable under the Statute, or is anything more to him in fact than as the subject of a mere debt, or *chose in action* (*Wood v. Wood*, 4 Q. B. 397; *Watts v. Jefferyes*, Jur. *sup.*). It is believed, however, that the Court will not be found eager to make any distinction in this respect between a cheque and the money it represents. The Court in England has made every effort to obey the spirit of the Act. Indeed, in ordering the transfer of a cheque in one of the above cases, the point was raised whether or not the cheque was, until its actual delivery to the person in whose favour it was drawn, his property; and in *Courtoy v. Vincent* the M. R. expresses his opinion concisely that it is not; at least not so as to justify the sheriff in seizing it. The express order of the Court and its sanction to the sheriff's action will perhaps cure an irregularity which otherwise might be held to occur. In *ex parte Reece* "the Accountant-General certified to the Court that he knew of no instance of an order on him to pay money over to an execution creditor, although there were orders to pay assignees of insolvent debtors and sequestrators."

W. S. G.

## REVIEWS.

## REVIEWS.

THE CANADIAN MONTHLY AND NATIONAL REVIEW. June, 1878. Hunter, Rose & Co. Toronto.

There was a time when people wished well to this periodical. It has, however, for some time past contained a series of articles similar in tone to those written in England and the Continent by the free-thinkers, deists, rationalists, positivists, materialists, &c., of the day, and this whilst the high-sounding title with which it began its career is retained. This is a mistake. We have yet to learn that the followers of Voltaire, Tyndal, Harrison, Huxley, and others represent the national element of this Canada of ours. We thank the managers, however, for one thing, and that is, that the doctrines which the wisdom of even worldly men have pronounced to be most detrimental to a country's greatness, most subversive of law and order, are presented in such a manner that they have to the average mind somewhat the effect intended to be produced by the Spartan parents who gave their children goblets of wine to drink in which reptiles had been placed. There is withal, in most of the articles to which we allude, so much ignorance, and so many misapplications as well as such a "fortuitous concurrence" of contradictory arguments and hopeless absurdities combined with such an assumption of intellectual eminence as to breed contempt even in the minds of those who are not even professing Christians. Such literature, however, cannot but have most injurious and poisonous effect upon the minds of large classes in the community, and this is our excuse for alluding at any length to matters not strictly within our limits, but which are contained in a periodical sent to us for review.

Some months ago, in the same periodical a comparison was drawn between Mohamedanism and Christianity, and, in the opinion of the writer, the former was probably the most desirable superstition of the two. One of the leading articles this month is headed "The New Refor-

mation." The writer states himself to be a member of the "Progressive Society of Ottawa," (whatever that may be), for which Society this paper was written. He begins with the argument that because all professing Christians do not live up to the pattern which they claim has been set them, therefore Christianity did not come as a direct gift from the Supreme Being, and there is in fact no Supreme Being such as Christians superstitiously worship, but there is "Nature" and there is "Truth," and Truth is to be worshipped "by the endeavour to place our lives in harmony with what we recognise as the good and pure in our nature." But it is said also that "nature knows no forgiveness," and it is admitted that "our Cosmos has not reached perfection," though it is "progressing towards perfection, and will, eventually, we all hope, reach that goal." It is clear, therefore, that the present inhabitants of our Cosmos are in a very hopeless condition, for it is admitted that they are as yet far from perfect.

Persons, however, who die in their sins, and like the members of this Society "neither hope nor expect to be forgiven," will have the comforting assurance that their descendants who may live some thousands of years hence will probably arrive at perfection and need no forgiveness. It is possible, however, that the perfection of this world may *not* be "evolved," although we are told, as one of the unanswerable arguments in favour of it, that "the savage instinct of war is dying out. Science is killing it." Yet this rubbish is written when the shrieks of murdered and mutilated women and children are still sounding in our ears from intellectual Europe, and the horrors of the Communism are still unforgotten in its capital.

This writer's profound knowledge of the springs of human thought and action are shown by his holding up as a motive for leading a good life, stronger than gratitude for the love of a dying Saviour, the laudable endeavour to evolve perfection for the benefit of the human race at some remote period of the world's history!

Christianity is described as a "persuading spirit." It is moreover commen-

## REVIEWS—BOOKS RECEIVED.

ed as a form of religion which has been useful in its day for police purposes, but its decay may be very accurately dated from the time that the first professed Christians admitted the doctrine of toleration; since the Reformation of Luther it has become of less use; and now that the Reformation of the Progressive Society of Ottawa has dawned it has become obsolete! Our readers will, however, be glad to learn that "we of the Progressive Society are, I may truly say, determinedly opposed to the idea of doing away with religion." This is gratifying, but it is difficult to understand how there can be Religion without a Divinity to worship, unless indeed this Society falls down before their own ideal of what is Truth and the "Paternal Power of the Universe, which is neither love nor fear, but is Law."

The writer has, or affects to "have the utmost confidence in the perfectibility of the human intellect." What he possibly intended to assert confidence in was the attainment eventually of all knowledge by means of the human intellect; even he can scarcely pretend that the individual brain-power of this century is greater than that of any preceding one, though undoubtedly in these times "many run to and fro, and knowledge is increased."

It may be that the time of "strong delusions" is coming on the earth, otherwise it would be strange that men, who assume to teach others, should be found who publicly announce their disbelief in the evidence of a Divine revelation, which is fortified by facts which are as clearly proved as any other matter of history of the same period, and which are believed by them to be substantially true.

We feel bound to say as much as we have said in reference to recent numbers of this monthly, a periodical, which was started under the happiest auspices, and conducted with an ability superior to that of any other on this side of the water. We are informed, however, that the *Canadian Monthly and National Review*, as such, has ceased to exist; and we are glad to know that its place will

be supplied by a monthly magazine which under its proposed management, will not offend the "prejudices" of any of its readers, and will, we trust, remind us of the *Canadian Monthly* in its palmiest days.

THE LAW OF TRADE MARKS AND THEIR REGISTRATION, and matters connected therewith, including a chapter on Goodwill. By Lewis Boyd Sebastian, B. C. L., M.A., of Lincoln's Inn, Esq., Barrister-at-Law. Stevens & Sons, 119 Chancery Lane, London, Law Publishers, &c. 1878.

The author also gives his readers an appendix containing Precedents of Injunctions, &c. The Trade Marks Registration Acts, 1875—7, the Rules and instructions thereunder; The Merchandise Marks Act, 1862, and other Statutory enactments; and The United States Statute, 1870, and the Treaty with the United States, 1877; also the New Rules and Instructions issued in February, 1878.

The time has scarcely arrived in this country for a book on this subject to be much sought after. It will soon come, however, in the natural order of things. In the United States there is a volume published in which are collected the American authorities, and we notice that Mr. Sebastian refers to a number of the cases there cited.

The author gives in this volume a complete view of the law of Trade Marks in England. His first chapter is a general introduction. The next discusses what a Trade Mark is. The third chapter treats of the acquisition, transfer and discontinuance of Trade Marks. The subsequent chapter deals with their infringement, criminal prosecutions under the statute law, civil remedies, and cases analogous to those of Trade Marks. The chapter on the good-will of a trade is a valuable contribution to the law on that subject.



## Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 41st VICTORIA.

During this Term, the following gentlemen were called to the Bar, viz. :—

GEORGE FERGUSSON SHEPLEY.  
WILLIAM JAMES CLARKE.  
WILLIAM EGERTON HODGINS.  
JAY KETHUM.  
ROBERT SHAW.  
HAMILTON PARKE O'CONNOR.  
WILLIAM CAVEN MOSCRIP.  
JAMES JOSEPH ROBERTSON.

The following gentlemen were called to the Bar under 39 Vict. chap. 31. :—

DANIEL O'CONNOR.  
JOSEPH BAWDEN.

The following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

### *Graduates.*

ALEXANDER DAWSON, B.A.  
THOMAS DICKIE CUMBERLAND, B.A.,  
WILLIAM BANFIELD CARROLL, B.A.

### *Matriculants.*

FRANCIS BADGELEY WILLIAM MOLSON GILBERT LILLY.

JOSEPH MARTIN.  
J. A. C. REYNOLDS.

### *Junior Class.*

HUGH ARCHIBALD MACLEAN.  
WILLIAM BURGESS.  
LOUIS F. HEYD.  
JAMES FOSTER CANNIFF.  
JOHN DOUGLAS GANSEY.  
GEORGE CORRY.  
EDMUND WALLACE NUGENT.

CHARLES PATRICK WILSON.  
DAVID MCARDLE.  
THOMAS HISLOP. •  
WILLIAM ALEX. McLEAN.  
ALEXANDER JOSEPH WILLIAMS.  
JAMES JOSEPH PANTON.  
WILLIAM MELVILLE SHOEBOOTHAM.  
JAMES GAMBLE WALLACE.  
GEORGE MOREHEAD.  
WILLIAM GEORGE SHAW.  
ROBERT PATTERSON.  
HARRY HYNDMAN ROBERTSON.  
JAMES ALEX. SHETTLE.  
MOSES MCFADDEN.  
ARTHUR B. FORD.  
GEORGE HIRAM CAPRON BROOKE.

### *Articled Clerk.*

HENRY WHITE.

## PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

### CLASSICS.

Xenophon, Anabasis, B. I. ; Homer, Iliad, B. I. ; Cicero, for the Manilian Law ; Ovid, Fasti, B. I., vv. 1-300 ; Virgil, Æneid, B. II., vv. 1-317 ; Translations from English into Latin ; Paper on Latin Grammar.

### MATHEMATICS.

Arithmetic ; Algebra, to the end of Quadratic Equations ; Euclid, Bb. I., II., III.

### ENGLISH.

A paper on English Grammar ; Composition ; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.



## LAW SOCIETY, HILARY TERM.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. *Museaus*, *Stumme Liebe*. Schiller, *Lied von der Glocke*.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or,

Virgil, *Aeneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and

Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

*1st Year.*—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

*3rd Year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

*4th Year.*—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

N.B.—After Easter Term, 1878, Best on Evidence will be substituted for Taylor on Evidence; Smith on Contracts, for Leake on Contracts.

## DIARY—CONTENTS—EDITORIAL ITEMS.

## DIARY FOR JULY.

2. Mon. County Court term begins. Heir and Devisee sittings begin. Dom. day. Long vacation begins.  
 6. Sat.. County Court term ends.  
 7. Sun. Col. Simcoe, Lieut.-Gov., 1792.  
 14. Sun. Hon. W. P. Howland, Lieut.-Gov. Ontario, 1868.  
 16. Tues. Heir and Devisee sittings end.  
 23. Tues. Union of Upper and Lower Canada, 1840.  
 24. Wed. Canada discovered by Cartier, 1834.  
 25. Th.. Battle of Lundy's Lane, 1813.  
 26. Fri.. Jews first admitted to House of Commons, 1858.  
 30. Tu.. First English newspaper published, 1588.

## CONTENTS.

EDITORIALS :	PAGE
Mr. Justice Wilson.....	189
Queen's Bench business.....	189
United States Bankrupt Law.....	189
The Temperance question.....	189
Notes on Time.....	190
A Summons from Parnassus.....	192
SELECTIONS :	
Three Great Law-Breakers.....	193
ENGLISH REPORTS :	
Digest of the English Law Reports for November and December, 1877, and January, 1878.....	194
CORRESPONDENCE :	
Dissenting judgments.....	204
Primary Examination Questions.....	206
LAW STUDENTS' DEPARTMENT :	
Examination Questions.....	106
REVIEWS.....	207

## Canada Law Journal.

Toronto, July, 1878.

Mr. Justice Wilson did not take his seat on the Bench last term, having obtained leave of absence to recruit, after many years of most faithful and laborious discharge of his judicial duties. We trust he may return in renewed health and strength.

The unprecedented sight was seen one day during last Term of the Queen's Bench sitting to rise again forthwith for want of work. The judges had in fact got ahead of their work, and occupied the novel position of "driving business, instead of business driving them." This is as it should be, and we cannot but

congratulate the litigating portion of the community on the fact.

The Bankrupt Law in the United States has been repealed, and will cease from the first of September next. The *Albany Law Journal* anticipates that benefits will thereby accrue to honest tradesmen and vigilant creditors. It asserts, moreover, that the Bankrupt Act has tended to make trade unsettled and uncertain; that it has destroyed solvent houses, temporarily embarrassed, whilst it has tempted multitudes to be reckless and extravagant. There is a feeling among many mercantile men in this country that the advantages of our Insolvency Law are more than counterbalanced by the evils resulting from it. The question is a large one, and requires serious consideration. At present, however, there would be few to mourn the repeal of the Act, except an army of official assignees and some rascally tradesmen, who fail periodically and gradually grow wealthy. An honest trader is generally protected by his creditors, a dishonest one should have no protection.

A comprehensive mode of arriving at the sense of the country on the Temperance question was suggested by a learned Parliamentary draftsman, and his suggestions were put in the shape of a bill, which however, as a *nullus filius*, never came before the House, the gentleman for whom it was prepared being apparently alarmed at the size of the bantling, and so abandoning it. The plan proposed was to have the question of prohibition answered by electors on the ballot papers at the next general election. The learned gentleman who prepared the bill stated his views on the subject in a memorandum which was printed at the end of the draft bill. He there said :

## NOTES ON TIME.

"The advantage of this plan would be, that the sense of the whole Dominion upon the question would be ascertained at once, and legislation might be adapted to the result, almost without cost of time or money, while separate elections would entail a very heavy expenditure of both. Parliament alone has power to deal with trade and crime. Drunkenness is a crime by Act of the English Parliament passed before Canada became a British Province, and is the parent of all the more violent offences. Where there is power to punish crime there must be power to prevent it. There is morally no crime in carrying arms, or in playing a game of cards in a railway car, and yet Parliament has passed laws to prohibit either, because either may lead to crime,—and in the case of contagious diseases of animals, it has given the Governor in Council power to make provisions on subjects usually entrusted to the municipal authorities (32-33 V., c. 37), and has expressly enacted (s. 21), that the order of the Governor, relative to an infected place, shall supersede any order of a local authority inconsistent with it. It has prohibited the sale of intoxicating liquors where public works are being carried on; and has the same right to prohibit or regulate the sale elsewhere, for the same purpose,—the prevention of crime. Many more instances of such legislation by our Parliament might be adduced. Indeed the avowed purpose of criminal law is to prevent crime rather than to punish it; it is punished to prevent its recurrence."

## NOTES ON TIME.

When a statute speaks of a year, it means the whole twelve months as computed by the calendar. Half a year consists of one hundred and eighty-two days, for the law does not regard a fraction of a day, *Bishop of Peterborough v. Catesby*, Cro. Jac. 166. So a quarter of a year consists of but ninety-one days, for the law does not regard the six hours afterwards: Co. Lit. 135, b.

"A twelvemonth," in the singular number, includes all the year; in the plural it may mean only forty-eight weeks: *Crooke v. McTavish*, 1 Bing. 307 (Per Park J.)

When a deed speaks of a month it

shall be intended to be a *lunar* month, unless the context indicates that a calendar month was meant: *Lang v. Gale*, 1 M. & S. 111. And the same rule holds generally in other contracts, unless it be shown that the usual understanding in the particular branch of business is that such bargains contemplate calendar months: *Reg. v. Inhabitants of Chawton*, 10 L. J. M. C. 55; *Titus v. Preston*, 1 Stra. 652.

But when persons bargain that the purchase of *lands* shall be completed within so many months, calendar months are implied: *Hipwell v. Knight*, 1 T. & Col. 401 (Eq. Ex.)

Sir Wm. Grant explained the principle as to including or excluding the day when time is to be computed from an act or event. In *Lester v. Garland*, 15 Ves. 247, he points out that the authorities make this distinction, that where the act done is one to which the party against whom the time runs is privy, the day of the act done may reasonably be included; but where it is one to which he is a stranger, it ought to be excluded.

When a month's notice of action is required, the day on which the notice is given and on which the action is begun are excluded: *Young v. Higgin*, 6 M. & W. 49.

As a general rule, where a certain number of days' notice of an intention to do an act is necessary, the day of the service of the notice is excluded and that on which the act is to be done is included: *Rez v. Cumberland*, 4 N. & M. 378. Where a statute required notice to be given "*within two days after the damage was done*," the injury by fire happened on Saturday, and notice was given on Monday following. Lord Tenterden applied the rule laid down by the Master of the Rolls in 15 Ves. and said the computation was to be made from an act not done by the party plaintiff, and of which

## NOTES ON TIME.

he might be at the time wholly ignorant. Here also, he went on to observe, only *two* days are allowed for giving notice, if those two days expired on the Sunday, when would the time have expired if only *one* day had been allowed? It could hardly have been said that the notice must be given on the very day when the fire happened: and if one day could have extended the time to Sunday, two days must extend it to Monday. This was followed in *Webb v. Fairman*, 3 M. & W. 477, and it was held there that if a person purchase goods to be paid for in two calendar months, the credit does not expire till the end of the corresponding day of the second month.

When by statute "ten days" notice of appeal is to be given, this is satisfied by reckoning one day inclusive and the other exclusive: *Rex v. Justices of West Riding*, 4 B. & Ad., 685. But when "ten clear days" are required, then the day of serving the notice and the day of the sitting of the Court are to be both excluded: *Rex v. Herefordshire*, 3 B. & Al. 581. The same exclusion of both days obtains when so many days' notice "at the least" is to be given: *Mitchell v. Foster*, 9 Dowl. 527; *R. v. Shropshire*, 8 A. & E. 173; *Beard v. Gray*, 3 Chan. Cham. R. 104.

When time is allowed for the doing of an act "until," or "at" a particular day, that day is included: *Kerr v. Jeston*, 1 Dowl. N. S. 538; *Archer v. Saddler*, 1 Fost. & Fin. 483; *Rex v. Skiplam*, 1 T. R. 490. Usually when the time is fixed for doing a thing by Statute, as *within two days*, or the like, Sunday is included: *Ex p. Simkin*, 29 L. J. M. C. 23; *Peacock v. Reg.* 4 C. B. N. S. 264.

When no time is expressly mentioned for the performance of an act, the law allows a reasonable time: *Ellis v. Thompson*, 3 M. & W. 456. And this is a

question of fact: *Startup v. Macdonald*, 2 M. & Gr. 395.

*Forthwith*, *immediately*, *instantly*, always receive a construction equivalent to as soon after as can reasonably be expected: *Thompson v. Gibson*, 8 M. & W. 281; *Simpson v. Henderson*, 1 M. & Malk., 300; *Boyes v. Bluck*, 1 C. L. R. 223; *Toms v. Wilson*, 4 B. & S. 442.

*From any day until another*: "From has in this position no settled meaning and may mean either inclusive or exclusive according to the context and subject matter. The Court will construe it so as to effectuate the deeds of parties and not to destroy them: *Pugh v. Leeds*, Cowp. 713. In *Ammerman v. Digges*, 12 Ir. C. L. R. p. i. (app). in a letter of license from creditors to a debtor "for and during the term of one year from the date" it was held that the day of the date should be excluded from the computation of the year. The cases are reviewed in *Isaacs v. Royal Insurance Company*, 18 W. R. 982, and the conclusion is reached that while there is no invariable rule in computing time "*from any day until another*," whether the first is to be included or excluded and the last included or excluded, still the tendency of modern decisions has been to include the last day. See also *Bank of Montreal v. Taylor*, 15 C. P. 113.

When a thing is to be done in a time specified "*after*" a particular fact, the day of the fact is to be reckoned as excluded. Three days after service excluded the day of service: *Weeks v. Wray*, W. N., 1868, p. 30. The rule was formerly otherwise: see *Berry v. Andrews*, 3 O. S. 646; but this case would not now be followed: *Sutherland v. Buchanan*, 9 Gr. 135.

When a proceeding has to be taken, in case issue has been joined three weeks "*before*" the sittings of the Court, the computation should include the day on

## NOTES ON TIME—A SUMMONS FROM PARNASSUS.

which issue has been joined: *Wilson v. Black*, 6 Prac. R. 130.

A contract to do a thing "*directly*" does not imply that it is to be done *instantly*, but there must be no delay in the performance: *Duncan v. Topham*, 8 C B. 225.

## A SUMMONS FROM PARNASSUS.

An occasional correspondent, whose feelings of delight at the arrival of the long vacation have got the better of him, sends us the following paraphrase in rhyme of an "original writ." It does him credit, and is, we think, quite as good as his Indenture done into verse, published by us some time since:

"To JOHN SMITH,

His servants and agents, VICTORIA  
Sends greeting: we trust that this process won't bore you.

In our Court of Chicanery one Brown doth make

A complaint—*i. e.* *Chancery*, (printer's mistake)—  
However, the said Brown now lately hath filed  
A Bill of Complaint here, wherein are compiled  
An account of your doings, and saith he is  
grieved

Thereat; and he prays that he may be relieved,  
As against the aforementioned acts of iniquity,  
Because they're repugnant to Conscience and  
Equity.

Now, as it is shown that the truth is the same as is  
Fully related by him in the premises,  
We've caused this to issue, upon due enquiry  
*Secundum discretionem boni viri*.

And if you should ask us, *Vir bonus est quis?*

Of your grace and mere motion we answer you  
this,

(To which we may add, you by no means deserve  
it):—

*Qui patrum consulta, qui juraque servat.*

Considering, therefore, that Brown hath related  
The truth, touching what in his bill hath been  
stated;

We strictly enjoin upon you to refrain  
From the acts we referred to before, under pain  
Of incurring our heavy displeasure; and not

Only that, but we'll make it exceedingly hot  
For you, the aforesaid iniquitous cove,  
For we'll order our Sheriff to nab you, by Jove!<sup>18</sup>  
To conduct you to where we give plain lodging  
*gratis*,

And watch you with care, till you cry out *jam satis!*

There we'll cause you to live like a very *recluse*,  
While we, meanwhile, appropriate to our own  
use

Your lands that you bought with your hardly  
earned pelf,

Your carriage and horses, blue china and delf,  
Your ormolu clocks, your champagnes and hocks,  
Your plate that you keep under two or three  
locks,

And your profits from money invested in stocks;  
Your carpets, and zooks; your piano and books,  
Your pictures suspended from silver-gilt hooks,  
Your statuettes standing in nice little nooks,  
And your mirrors, in which your wife constantly  
looks;

Your treasures of art, that are dear to your  
heart,

With which you declare that you never will  
part.

And we'll do everything we can think of that  
shocks you,

While Brown looks on coolly, and laughs at and  
mocks you;

And when we've disposed of your jewels and  
trinkets,

We've no hesitation in saying you'll think it's

As well to obey our decrees and commands,  
And thus save your goods, and your chattels and  
lands.

Now, to show you that this is not all empty  
brag,

As witness, our Chancellor Godfrey de Spragge,  
Who gauges the rights of each case, as it's put,  
By the breadth of his soul, and the length of his  
foot.

Now glance at the margin—pray look at that  
seal,

And the stamp, duly cancelled—more proof that  
you'll feel

Our vengeance, worked out without any com-  
punction,

If you do not choose to obey this injunction.

But if you do Smith, old man, why we'll 'cry  
quits.'

A. HOLMESTED,

*The Clerk of our Records and Writs."*

<sup>18</sup>The 37 Vict. cap. 37, entitled "An act for the suppression of voluntary and extra-judicial oaths," does not apply. Besides being only *somewhat* judicial this oath was involuntary.

## THREE GREAT LAW BREAKERS.

## SELECTIONS.

## THREE GREAT LAW-BREAKERS.

If a foreigner should accuse the citizens of the United States of a disregard for law, they would probably regard the charge as a gross slander. We are in the habit of pluming ourselves as a law-abiding and order-loving people. And yet it must be conceded that we are a long-suffering people under notorious and shameless infringements of our laws, and that there is a vast amount of "dead-letter law" among us. We have taken pains to speak before on this subject. Our attention is called to it again by the recent and nearly simultaneous death of three very prominent and notorious persons, all long-time residents of the metropolis of this country. It has occurred to us that if a British tourist should have visited our country about three years ago, and should have animadverted upon the lives, employments and influences of William M. Tweed, John Morrissey and Madam Restell, in just and natural terms, the impulse of our people would have been to resent the attack as they resented the attack of Dickens upon the American institution of slavery. Not to say that our people would ever seriously have defended the crimes of political corruption, gambling and abortion, yet so great would have been the sensitiveness of the sore spots that they would have shrunk from the probe of the censor.

The anger of men at the exposure of their vices is much deeper than their pleasure at the approval of their virtues. So all the praise which Dickens bestowed upon our State prison system and our charitable asylums could not allay the irritation which he excited by his just denunciation of slavery.

Doubtless, the foreign tourist would have been in error in assuming that the toleration and prosperity of such persons as Tweed, Morrissey and Restell was a fair index or gauge of the moral state of the community, but he could not have been blamed for remarking such an astonishing spectacle, nor for accusing so supine and indifferent a community of

practical participancy in their crimes. That one man should have arisen from the condition of an uneducated mechanic to the rank of State Senator, to the absolute control of a great political party, and the undisputed disposal of millions of the public money, and should for years have controlled elections and made and unmade high officials by his breath, all through the undisguised practice of bribery and corruption; that another man, originally a professional prize-fighter, should have been repeatedly chosen by wealthy and aristocratic constituencies to seats in the State Senate and the lower house of Congress, while all the time the proprietor of a gambling-house; and that a woman, by profession an abortionist, should have lived in a palace on Fifth avenue, and flaunted her showy equipage in Central Park; and that all these persons should for so many years, either not have excited or have escaped the vengeance of the law, certainly argues a very singular condition of morals. In truth there is always a sort of secret sympathy and admiration in every community for successful and brilliant defiance of the law. For how many years did very respectable men quote Tweed's formula, "what are you going to do about it?" with a tacit assent to the idea that it would probably be of little use to try to do anything about it. Even now, there are probably a good many virtuous and respectable people who think rather impatiently of Mr. Comstock's efforts to suppress infanticide and obscene literature. There was a good deal of shrewdness in the reply made by a lawyer whom the writer once detected in the act of purchasing a copy of the *Police Gazette*: "Is it possible that you buy that paper?" "Certainly," was the reply, "what gentleman doesn't?" So long as a crime does not affect ourselves, or involve human life, our sympathies for the sufferers are not apt to be very acute, and in fact are quite apt to be on the side of the offender. Men always like to see the weaker party come off best. That was the feeling which led ladies to visit highwaymen in their cells, and give them flowers on their way to execution. In regard to offences like those of Tweed, it may be added that "what is every-

## DIGEST OF ENGLISH LAW REPORTS.

body's business is nobody's business." Offences against the public treasury are quite generally regarded as venial. In the opinion of a great many very decent people it is not a very heinous offence to smuggle, provided one does not make a business of it; but a little amateur smuggling for one's self or one's friends, accompanied by a little judicious corruption of the revenue officers, is a rather clever achievement. Tweed had the advantage of being a public robber on a grand and audacious scale. What protected Madam Restell in her long career of infamy, on the other hand, was the peculiarly secret character of her offence, and the improbability of the employment of accomplices, or the use of appliances which could be traced, together with the idea so prevalent that the offence of abortion is rather against sentiment than against morals. It would be difficult to say what protected Morrissey in his business, unless it was true, as he was in the habit of declaring, that there was a public demand for well-regulated gambling places. Mr. Morrissey, with his blunted moral perceptions, used to justify himself by declaring that gambling was no worse than stock-jobbing, or for that matter, than trade itself. But when he invited us to come into his club-house at Saratoga some years ago, and see the persons who were his patrons, our acceptance of his invitation convinced us that he was in no danger of prosecution, however erroneous might be his views upon the comparative moral equality of Saratoga and Wall street. If any one is disposed to try the experiment, he may easily experience the sensations of young Goodman Brown, in Hawthorn's weird legend, when he attended the witches' pow-wow and found there the minister, elders, and deacons, and the matrons and maidens of his own Church.

It is true that the community of the metropolis has lashed itself into a spasm of virtue. It has crushed out Tweed and "smashed his ring." It has driven the Restell woman to suicide, and has experienced a holy satisfaction in the reflections incident to that occurrence. The newspapers and the pulpit have had much to say against Morrissey's occupation, but we have not heard up to the

hour of going to press, that his place has been shut up except for the funeral. It has thundered awfully. An outraged people has arisen in its majesty and wrath, and overwhelmed the audacious violators of the law, and all that sort of thing. But the question arises: are political corruption and bribery, abortion, and infanticide, and gambling, any less prevalent than before the storm? Are the laws against these crimes any less dead-letter laws? We would that these inquiries might be answered in the affirmative, but we fear that they cannot be. We fear that there is the same individual carelessness about infractions of public rights; the same unrestrained licentiousness; the same greed of gain and love of chance, which rendered possible the career of these three great law-breakers. Law-makers and lawyers cannot convert the spirit of a community, but they can at least do something to preserve law from derision. They can encourage attempts to detect and punish violations of law, and they can punish the guilty. The public authorities have been and are still blamable in this matter. There is a leaven of public sentiment that would sustain them in advances against the strong-holds of such crimes as we have mentioned, and a vigorous and unrelenting prosecution of such offenders would at length create a general public interest which is now lacking. Rain will extinguish a fire, but if you burn powder enough you will produce a rain, as the history of great battles show. There may not be public interest enough to inspire the prosecution of minor offenses, but the faithful discharge of official duty would engender the public spirit which should be the moving cause.

—*Albany Law Journal.*

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## ENGLISH REPORTS.

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DIGEST OF THE ENGLISH LAW REPORTS FOR NOVEMBER AND DECEMBER, 1877, AND JANUARY, 1878.

(From the *American Law Review*.)

ACCOUNT.—See COVENANT, 2.

ADJACENT SUPPORT.

Between the coal-mines of the plaintiff

## DIGEST OF ENGLISH LAW REPORTS.

and those of the defendant there was an intermediate piece of surface land, from under which the coal had long before been extracted by a third party. In the ordinary working of his mine, defendant had dug near the intermediate piece of land, and the latter had given way, thus causing a portion of the surface over plaintiff's mine to subside. *Held*, that the plaintiff was entitled to no relief.—*Corporation of Birmingham v. Allen*, 6 Ch. D. 284.

See INJUNCTION, 2.

ADMINISTRATOR.—See EXECUTOR AND ADMINISTRATOR.

ADVANCEMENT.—See HUSBAND AND WIFE, 1; WILL, 3.

ADVERSE POSSESSION.—See COVENANT, 2.

AGREEMENT.—See LEASE.

ANCIENT LIGHTS.

Where an old building having ancient lights was demolished and a new one put in its place, and a skylight put into the new one, substantially where a dormer window in the old one was situated, *held*, under the circumstances, that by 2 & 3 Will. IV. c. 71, § 3, the right to the light was not lost. But where the new building on the servient estate which obstructed the skylight was nearly completed, damages were allowed and an injunction refused.—*National Provincial Plate Glass Ins. Co. v. Prudential Ins. Co.*, 6 Ch. D. 757.

ANTENUPTIAL SETTLEMENT.—See SETTLEMENT, 5.

APPOINTMENT.—See WILL, 1, 5.

ATTORNEY AND CLIENT.

1. Rule that a solicitor cannot take a gift from a client while the professional relation exists, applied with rigour.—*Morgan v. Minett*, 6 Ch. D. 638.

2. A solicitor who acts for both mortgagor and mortgagee cannot claim a lien upon the title-deeds for costs due him from the mortgagor, so as to entitle him to withhold the deeds from the mortgagee until those costs are paid, although the mortgagee knew that he had such lien as against the mortgagor.—*In re Snell (a solicitor)*, 6 Ch. D. 105.

3. A client paid her solicitor his bill, and gave her business to other solicitors, who also received the deeds and other documents relating thereto. *Held*, that the first solicitor could retain the client's letters to him relating to the business, and also the press copies of his to her.—*In re Wheatcroft*, 6 Ch. D. 97.

See COMPANY, 7.

BANKRUPTCY.

1. A gas-light company does not come within the words "landlord or other person to whom any rent is due from the bankrupt," in § 34 of the Bankruptcy Act, 1869, although the sum due the company for gas is, in one section of the Gas Works Clauses Act, spoken of as rent, and the special act under which the gas company was organized gives it

power to levy by distress for such sums.—*Ex parte Hill. In re Roberts*, 6 Ch. D. 63.

2. Certain traders being in contemplation of bankruptcy, and wishing to raise money, arranged with one S. to draw bills on them, which they accepted. S. then sold the bills, amounting to £1,717, to Jones, the appellant, for £200. Jones was a discounter of bills, but never had bought any before this transaction. He had refused to discount these bills. He supposed the acceptors could not pay in full, and might, by inquiry, have found out their true condition. He knew that they had assets; and on their going, three days afterwards, into bankruptcy, he claimed to prove for the full face of the bills. The County Court in bankruptcy restricted the proof to the £200 paid for the bills; but the Chief Judge reversed this, and allowed proof on the face of them; the Court of Appeal reversed the Chief Judge's order; and, on appeal to the House of Lords, *held*, that proof for £200 only could be allowed, as Jones must be held to have had knowledge of the fraud on the part of the maker and acceptors of the bills.—*Jones v. Gordon*, 2 App. Cas. 616; a. c. 1 Ch. D. 137; 10 Am. Law Rev. 684.

3. In a marriage settlement, M., the intending husband, assigned a policy on his life, for the benefit of his wife, to the trustees, and covenanted to pay the premiums. At the same time, a fund was set apart, out of which the premiums were to be paid, in case M. failed to pay them. May 8, 1871, M. went into bankruptcy, and from that time the premiums were paid out of the fund. May 15, 1874, the trustees of the settlement had the value of M.'s covenant to pay the premiums estimated, and proved the amount, being £2,052 8s., as a claim against his estate. April 13, 1876, a dividend of 10s. was declared on M.'s estate; but before the receipt for this percentage on the above £2,052 8s. was signed by the trustees of the settlement, M. died. The amount paid for premiums out of the wife's fund had been £766 5s. The court *held* that the trustees of the settlement should receive only the £766 5s. actually paid out in lieu of the dividend on £2,052 8s. already declared.—*In re Miller. Ex parte Wardley*, 6 Ch. D. 790.

BEQUEST.

Testatrix gave to a charity all her household furniture, pictures, goods, chattels, trinkets, jewellery, and effects which might be in her dwelling-house, and also all her ready money, money at the bankers, and money in the public funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution. Her personal property amounted to about £100,000, and her real to about £50,000. The will contained nothing but this bequest, and the appointment of executors. *Held*, that the bequest to the charity was specific, and that the debts, expenses, and costs must be paid first out of the personal estate undisposed of, then out



## DIGEST OF ENGLISH LAW REPORTS.

of the real estate; but that the heirs having no interest in the probate of the will, the real estate was not in any event liable for the probate duty which must come out of the charitable bequest. The unpaid premium on a long lease, which the testatrix had sold some time before her death, was declared realty.—*Shepherd v. Beetham*, 6 Ch. D. 597.

BILL OF LADING.—See MORTGAGE, 2.

BILLS AND NOTES.—See BANKRUPTCY, 2; HUSBAND AND WIFE, 2.

BURDEN OF PROOF.—See PRESUMPTION.

CARRIER.—See COMMON CARRIER.

CHARITY.—See BEQUEST.

CONDITION.—See COVENANT, 2; RAILWAY.

CONSIDERATION.—See HUSBAND AND WIFE, 3.

CONSTRUCTION.

H. E. died in 1819, leaving a will dated in 1814. In it he devised real estate to R. F. in tail male, remainder to R. S., second son of Sir T. S., for life, remainder to R. S.'s first and other sons in tail male, remainder successively to J. S. and C. S., younger sons of Sir T. S., in tail male, remainder to his right heirs. In case the said R. S., J. S., or C. S. "shall become the eldest son of the said Sir T. S., then and in such case and so often as the same shall happen" the estate so devised to cease and determine as though "the person so becoming the eldest son of said Sir T. S. was then dead without issue male." There was a name-and-arms clause, by which the party taking should assume at once the testator's name and arms. R. F. died childless in testator's life-time. In 1820, R. S. complied with the name-and-arms clause, and entered into possession of the devised estates. In 1834, C. S., the youngest, died childless. Sir T. S. died in 1841, and his eldest son succeeded to his titles and estate. He died childless in 1863, having dis-entailed and sold the estates, and R. S. succeeded to the title. He died in 1875 without male issue, and J. S. succeeded to his father's title. In an action by the testator's right heirs against J. S. for possession of the estates under the will, *held*, that J. S. was entitled to them, neither he nor R. S. having "become the eldest son of" Sir T. S., according to the proper construction of the will. "Eldest son" defined.—*Bathurst v. Errington*, 2 App. Cas. 698; s. c. nom. *Bathurst v. Stanley*, and *Craven v. Stanley*, 4 Ch. D. 251; 11 Am. Law Rev. 688.

See BANKRUPTCY, 1; DEVISE; SEISIN; WILL, 2, 3, 4, 6, 7, 8.

CONTINGENT DEBT.—See BANKRUPTCY, 3.

CONTINGENT INTEREST.—See SETTLEMENT, 5.

CONTRACT.

Prior to November, 1871, B & Co., colliery owners, had been in the habit of supplying coal to the M. Co., at varying prices, without any formal contract. In that month, pursuant to a suggestion of B. & Co. for a

contract, a draft agreement was drawn up, providing for the delivery of coal on terms stated, from Jan. 1, 1872, for two years, subject to termination on two months' notice. The M. Co. prepared this draft agreement, and sent it to B., the senior of the three partners of B. & Co., who left the date blank as he found it, inserted the names of himself and his partners in the blank left for that purpose, filled in the blank in the arbitration clause with a name, made two or three other not very important alterations, wrote "approved" at the end, appended his individual signature, and returned the document to the M. Co. The latter laid it away, and nothing further was done with it. Coal was furnished according to the terms of this document, and correspondence was had, in which reference was often made to the "contract," and complaints made of violations of it and excuses given therefor. In December, 1873, B. & Co. refused to deliver more coal. In an action for damages, they denied the existence of any contract. *Held*, that these facts furnished evidence of the existence of a contract, and B. & Co. were liable for a breach thereof.—*Brogden v. Met. Railway Co.*, 2 App. Cas. 666.

CONVERSION.—See ELECTION.

CONVEYANCE.—See FRAUD.

COVENANT.

In the reign of Queen Elizabeth, grant of a farm on a yearly rent of 7s 6d. was made, with a proviso that the grantee and his heirs should dig only such an amount of coals from the mines under the premises as should "bee burned and occupied or ymployed in and upon the same." The grantee granted the farm, "with all . . . mynes, quarries, . . . and appurt nances," in 1629, to the predecessors in title of the plaintiffs, reserving the above rent. The defendant, claiming under a demise from a descendant of the original grantor, had, since 1847, in the *bona fide* belief that he had a right, been taking coals from these mines, having worked into them from the mines on his adjacent land. In 1869, the plaintiffs were advised for the first time that they were entitled to the mines, gave him notice of their claim; but nothing further was done until 1875, when this bill was filed. *Held*, that the proviso was a covenant, and not a condition; that the defendant had acquired no title to the mine by having worked it more than twenty years; that an injunction should be granted, with an account since 1869; and that the defendant was entitled in the account to charge for mining the coal and bringing it to the surface.—*Ashton v. Stock*, 6 Ch. D. 719.

COVERTURE.—See HUSBAND AND WIFE; SETTLEMENT, 3.

CRIMINAL PROCESS.—See INJUNCTION, 1.

DAMAGES.—See ANCIENT LIGHTS; MINE, 1; SPECIFIC PERFORMANCE, 1.

DATE OF WILL.—See WILL, 6.

## DIGEST OF ENGLISH LAW REPORTS.

**DEBT.**—See **WILL**, 6.

**DELAY.**—See **SPECIFIC PERFORMANCE**, 2.

**DEVISE.**

A testatrix gave property to her daughter and her husband for their lives, and after the death of the survivor to the children of her said daughter who should be living at the testatrix's decease; but provided that, in case any of the children should die "without leaving lawful issue," the portion of those so dying should go to the surviving grandchildren of the testatrix that should "leave such lawful issue." *Held*, that the words "without leaving lawful issue" applied to the period of distribution; that is, the decease of the surviving tenant for life. *Besant v. Cox*, 6 Ch. D. 604.

See **ELECTION**.

**DISTRIBUTION.**—See **DEVISE**.

**DIVERTING WATERCOURSE.**—See **MINE**, 2.

**DOMESTIC RELATIONS.**—See **HUSBAND AND WIFE**.

**DOWER.**

Mortgage in the ordinary form by D., with power of sale, and release of dower by his wife, made Dec. 24, 1846. Nov. 3, 1854, D. made a second mortgage, in similar form, conveying "freed and discharged of and from all right and title to dower" on the part of his wife, and subject to the mortgage of Dec. 24, 1846. In both mortgages the equity of redemption was limited to D. and his heirs and assigns. Dec. 4, 1858, the second mortgagee paid the first mortgage, and took a conveyance of the premises from the latter, subject to the equity of redemption in the first mortgage. In October, 1860, default was made on the second mortgage; and the mortgagees sold the property, which brought less than the amount of the mortgages. D. died Nov. 24, 1874, and, Oct. 14, 1875, the wife filed her bill against the mortgagees for the value of her dower in the equity of redemption sold by them. D. and his wife were married before the Dower Act. *Held*, reversing the decision of BACON, V.C., that she was not entitled.—*Dawson v. Bank of Whitehaven*, 6 Ch. D. 218; s. c. 4 Ch. D. 639.

**ELECTION.**

A person entitled, except on an event which never happened, to the proceeds of real estate, devised on a trust to sell and hold the proceeds for him, lived on the property all his life instead of having it sold, and at his death made careful disposition of it by will as real estate. *Held*, in a suit between the devisee and the personal representative, that he had a right to elect to take it as real estate, and that his acts while living, and the disposition made in his will, showed that he had so elected.—*Meek v. Denish*, 6 Ch. D. 566.

See **SETTLEMENT**, 4; **TRUST**.

**EMBEZZLEMENT.**—See **JURISDICTION**, 3.

**EQUITY.**—See **INJUNCTION**, 1.

**ESTATE FOR LIFE.**—See **WILL**, 5.

**EVIDENCE.**—See **CONTRACT**; **PRESUMPTION**.

**EXECUTOR AND ADMINISTRATOR.**

An executor or administrator stands in the relation of gratuitous bailee, and is not to be charged, either at law or in equity, for loss of goods, except through his wilful default.—*Job v. Job*, 6 Ch. D. 562.

**EXECUTORY DEVISE.**—See **DEVISE**.

**FALSA DEMONSTRATIO.**—See **WILL**, 1.

**FORFEITURE.**

**FRAUD.**

S., the defendant, sold the plaintiffs a lot of land as freehold. It turned out, after the purchase-money had been paid, that almost the entire lot was copyhold and not freehold. S. alleged that his statement that the land was freehold was *bona fide*. *Held*, that the sale must be set aside, and the purchase-money refunded with interest, and the plaintiff paid the expenses he had incurred in consequence of the misrepresentation. The defendant had committed a "legal fraud."—*Hart v. Swaine*, 7 Ch. D. 42.

See **BANKRUPTCY**, 2.

**FRAUDS, STATUTE OF**

1. Defendants wrote and signed an offer for the lease of a theatre, which offer was attested by the owner's agent. The owner's name did not appear in the writing, which was addressed to "Sir," without more. The offer was accepted by the agent, by a letter signed by himself, but in which the names of the defendants did not appear. *Held*, that there was not a valid agreement within the Statute of Frauds, and the proposed leases were not bound to specific performance.—*Williams v. Jordan*, 6 Ch. D. 517.

2. A party entitled to declare a trust on certain land wrote to the mother of her infant grandchild a letter, signed with the writer's initials, and enclosed in the envelope another paper, headed "Supplement," beginning, "I quite omitted to tell you," &c., and unsigned. There was no reference in the letter proper to the "Supplement." *Held*, that the unsigned document was not a sufficient declaration of trust under the Statute of Frauds.—*Kronheim v. Johnson*, 7 Ch. D. 60.

See **LEASE**; **SPECIFIC PERFORMANCE**, 1.

**FREIGHT.**—See **MORTGAGE**, 2.

**GIFT.**—See **ATTORNEY AND CLIENT**, 1.

**GUARANTY.**—See **HUSBAND AND WIFE**, 3.

**HUSBAND AND WIFE.**

1. A marriage settlement was made on the marriage of J. E., and property transferred thereunder to J. G., T. E., and J. H., trustees. Subsequently, J. E. placed £4,000 railroad debentures in the names of himself, his wife, and J. G., and sixty shares in a railroad company in the names of himself, his wife, and T. E. and J. G. It appeared that the income from the marriage settlement had been decreased about one quarter.

## DIGEST OF ENGLISH LAW REPORTS.

On the death of J. E., *held*, that the property so transferred was not an augmentation of the marriage settlement, but an advancement to the wife, who should receive it absolutely, the other parties in whose names the securities stood being trustees for the wife.—*In re Ekyng's Trusts*, 6 Ch. D. 115.

2. A husband and wife, married since the Married Woman's Property Act, 1870, gave a joint and several promissory note. The husband took the money, and afterward became bankrupt. *Held*, that the wife's separate property was liable on the note, and there was no necessity to make the trustees of her estate parties.—*Davies v. Jenkins*, 6 Ch. D. 728.

3. The wife of C., a retail trader, who was possessed of separate estate in her own right, without restraint to anticipate, gave a guaranty in writing to the plaintiff, a dealer with whom C. traded, as follows:—"In consideration of you, M., having at my request, agreed to supply and furnish goods to C., I do hereby guarantee to you, the said M., the sum of £500. This guarantee is to continue in force for the period of six years, and no longer." C. had previously dealt with M., and at the time of the guaranty a bill of exchange drawn by M. on C. for a balance had been dishonoured, and another bill was soon coming due. *Held*, that the guaranty applied to any moneys to the extent of £500 which should be due during six years, including the dishonoured bill; that the fact that goods were furnished subsequently created a good consideration to the wife for the guaranty; and that the separate estate of the wife was liable for any balance due M. from C., to the extent of £500.—*Morrell v. Cowan*, 6 Ch. D. 166.  
See DOWER; SETTLEMENT.

## INFANT.

A suit had been begun in the name of some infants by one P., a stranger, and the father had knowledge of the suit. When he learned of the suit, he applied for the removal of P., and substitution of himself, as next friend. Granted.—*Woolf v. Pemberton*, 6 Ch. D. 19.

## INJUNCTION.

1. Where a statutory board has power to recover a penalty by criminal proceedings for violation of a statute regulation, a court of equity will not interfere by injunction to restrain those proceedings. *Mayor of York v. Pilkington* (2 Atk. 302) criticised.—*Kerr v. Corporation of Preston*, 6 Ch. D. 463.

2. W. sold S. land adjoining other land of W., under which there were mines. S. purchased the land for the purpose of erecting heavy buildings for an iron foundry thereon, and W. was aware of this fact. Subsequently, W. leased the mines to H. & Co., who began mining. S., having begun to build on his land, applied for an injunction against W. and H. & Co., to restrain the working of the mines in a manner to endanger the support of his buildings. *Held*,

that S. was entitled to an injunction.—*Sidons et al. v. Short et al.*, 2 C. P. D. 572.

## INNKEEPER.

By 26 & 28 Vict. c. 41, § 1, no innkeeper is liable for loss of the goods of a guest beyond £30, except where such goods shall have been lost "through the wilful act, default, or neglect of such innkeeper, or any servant in his employ." Section 3 requires every innkeeper to keep section 1 posted in a conspicuous place in his inn, in order to entitle himself to the benefit thereof. The defendant had what purported to be section 1 posted properly in his inn; but, by an unintentional misprint, it read thus: "Through the wilful default or neglect of such innkeeper, or any servant in his employ." *Held*, that the misprint was material, and the innkeeper was not entitled to the benefit of the statute.—*Spice v. Bacon*, 2 Ex. D. 463.

INTENTION.—See WILL, 3.

JUDICATURE ACT.—See PROBATE.

## JURISDICTION.

1. The court declined jurisdiction where a foreigner brought an action for co-ownership against a foreign vessel, and another foreigner appeared to have the petition dismissed, and the consul of the State where the ship was registered declined to interfere.—*The Agincourt*, 2 P. D. 239.

2. Suit between two foreigners over a foreign vessel, where the court, under the circumstances, assumed jurisdiction for a particular purpose.—*The Evangelistria*, 2 P. D. 241.

3. A clerk employed to collect money, and remit it at once to his employers, collected several sums at a place in Yorkshire, subsequently wrote two letters to his employers in Middlesex, without mentioning the above collections, and afterwards a letter, intended, as found by the jury, to lead his employers to think that he had collected no money in Yorkshire. *Held*, that he could be tried for embezzlement in Middlesex, where the letters were received.—*The Queen v. Rogers*, 3 Q. B. D. 28.

See PROBATE.

LACHES.—See SPECIFIC PERFORMANCES, 2.

## LEASE.

Written agreement by the defendant with the plaintiff, duly signed by both, for the lease of a house for a certain term and price named. It was recited that "this agreement is made subject to the preparation and approval of a formal contract;" but no other contract was ever made. *Held*, that the agreement was only preliminary, and the defendant was not bound to specific performance.—*Winn v. Bull*, 7 Ch. D. 29.

See COMPANY, 2; FRAUDS, STATUTE OF, 1; SPECIFIC PERFORMANCE, 1, 2; VENDOR AND PURCHASER.

LEGACY.—See BEQUEST; WILLS, 7.

LETTERS.—See ATTORNEY AND CLIENT, 3; JURISDICTION, 3.

## DIGEST OF ENGLISH LAW REPORTS.

LEVY.—See SHERIFF.

LIBEL AND SLANDER.

An editor had been convicted of stealing feathers, and had been sentenced to twelve months' penal labour as a felon, which sentence he had duly served out. Afterwards, a brother editor called him a "felon editor," and justified by asserting the above facts. Replication, that as he, the convict, had served out his sentence, he was no longer "felon." On demurrer, *held*, a good reply.—*Leyman v. Latimer*, 3 Ex. D. 15.

LIEN.—See ATTORNEY AND CLIENT, 2 3.

LIFE INSURANCE.—See BANKRUPTCY, 3.

LIMITATIONS, STATUTE OF.—See COVENANT, 2.

MARRIAGE SETTLEMENT.—See SETTLEMENT, 1, 2.

MARRIED WOMAN'S PROPERTY ACT, 1870.—See HUSBAND AND WIFE, 2.

MARSHALLING ASSETS.—See BEQUEST.

MINE.

1. Defendant, a mine-owner, diverted the natural course of a stream for his own purposes; and, in an unusually heavy rain which followed, the water overflowed the new channel, and caused damage to an adjoining mine, belonging to the plaintiff. *Held*, that defendant might be liable therefor, although if the injury had happened in the ordinary course of working the mine, from a sudden and unusual natural cause not to be foreseen by a prudent person, no liability would have arisen.—*Fletcher v. Smith*, 2 App. Cas. 781.

2. A mining company sank a pit, and intercepted underground water, which had previously flowed in an unascertained course, and threw it upon the land of a neighbour. The water had previously, when left to flow underground of itself, come out upon the neighbour's land. *Held*, that the mining company was liable for the damage.—*West Cumberland Iron and Steel Company v. Kenyon*, 6 Ch. D. 773.

See COVENANT, 2.

MISPRINT.—See INNKEEPER.

MORTGAGE.

1. In a suit to redeem by a second mortgagee against the first mortgagee, the latter must answer interrogatories demanding the amount of his claim, and what other security, if any, he holds for it, so that the second mortgagee may know whether it would be worth while to redeem or not.—*West of England and South Wales Bank v. Nickolls*, 6 Ch. D. 613.

2. Dec. 1, 1874, M., the owner of a vessel, mortgaged it to appellants for £7,500. Jan. 4, 1875, respondents, in ignorance of the mortgage, advanced M. £3,000 on security of a cargo shipped by M. on nominal freight of 1s. per ton. Feb. 2, 1875, M. again mortgaged the vessel to the appellants for £4,000. February 19, M. and the defendants sold the cargo to J., on terms of freight being paid at 55s. per ton. February 22, the respondents advanced £9,000 more to M. February 26, M. assigned to the respondents

the freight at 55s. per ton, as security for their advances. On the arrival of the vessel, the appellants took possession. The respondents acquired J.'s rights. *Held*, that the appellants were entitled to 1s. freight only, according to the bill of lading, and must deliver the cargo to the respondents on payment of freight at that rate.—*Keith v. Burrows*, 2 App. Cas. 636; s. c. 1 C. P. D. 722; 2 C. P. D. 163; 11 Am. Law. Rev. 508; 12 *id.* 100.

See ATTORNEY AND CLIENT, 2; DOWER, 5.

MORTMAIN.—See BEQUEST.

NAVIGABLE RIVER.

The right of navigation in a river above tidewater, acquired by the public by user, is, as regards the owner of land through which the river flows, simply a right of way; and the owner of the land may erect a bridge over the river, provided it does not substantially interfere with this right of way for navigation. The property in the river-bed is in the owner of the land.—*Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

NEGLECT.—See CHARTER-PARTY; MINE, 1; TELEGRAPH.

NEXT FRIEND.—See INFANT.

NOTICE.—See INNKEEPER.

OMISSIONS IN WILL.—See WILL, 8.

PARTNERSHIP.

In September, 1871, C. gave bonds, in accordance with the rules of *Lloyd's*, to enable his son W. to become a member thereof, and begin the business of underwriter, as he the same month did, carrying on the business in his own name exclusively. In January, 1872, an agreement was made purporting to be between father and son, but executed only by the son, reciting that the father had given the bonds as above, and had also loaned the son £200; and, in consideration thereof, the son covenanted with the father that one H., and no other, should underwrite in W.'s name, and should be paid £200 a year and one-fifth the net profits; that C. should be at liberty to cancel the bond at any time, on notice to C. and H.; that C. should not spend more than £200 a year till he paid his debts; that one-half the net profits, deducting H.'s share, and £25 a year, should belong to C.; that W. should not indorse or speculate until he paid his debts; that W. should repay C. the £200 and interest on demand; that W. should keep a separate account, as underwriter, which should be liable to inspection by C.; and that the profits of business should not be touched before they amounted to £500, and then, with C.'s consent, an agreed sum might be withdrawn on account of W., and a like sum for account of C. None of the creditors knew that the father had anything to do with the business. The son also carried on two other distinct businesses in his own name. In bankruptcy proceedings against the son, *held*, that the father was not a partner in the

## DIGEST OF ENGLISH LAW REPORTS.

underwriting business.—*Ex parte Tennant. In re Howard*, 6 Ch. D. 303.

## PATENT.

In 1865, a patent for skates was granted in England. Two years before, a foreign book, giving a general description of the invention, was sent to the library of the Patent Office. A few weeks before the granting of the patent, another foreign book, containing a drawing of the invention, was sent to the library. The book was not catalogued, but was in a room open to the public, where a librarian testified that he once noticed it before the date of the patent. *Held*, not to be prior publication.—*Plimpton v. Spiller*, 6 Ch. D. 412.

PERSONAL COVENANT.—See COVENANT, 1.

PLEADING AND PRACTICE.—See HUSBAND AND WIFE, 2; INFANT; MORTGAGE, 1.

POSSESSION.—See SPECIFIC PERFORMANCE, 2.

POWER.—See WILL, 5.

PRACTICE.—See PLEADING AND PRACTICE.

## PRESUMPTION.

A respectable farmer and church elder courted a young lady for some years, and they were finally, in 1850, married, while she, to his knowledge, was in an advanced stage of pregnancy. Seven weeks afterwards, she was delivered of a daughter. The matter was kept secret, and the child removed to another part of the country, where the husband supported her till she became able to support herself. In 1875, the girl claimed to be his daughter; and he brought this action to have it declared she was not. Both husband and wife swore to that effect; and the wife told two different stories to account for her pregnancy. *Held*, that the presumption of paternity against the husband was, under the circumstances, almost irresistible, and that the burden was on him to show affirmatively the contrary, and this he had failed to do.—*Gardner v. Gardner*, 2 App. Cas. 723.

PRIVITY.—See TELEGRAPH.

## PROBATE.

When an action was brought for sale or partition of estates by a plaintiff, who claimed under an alleged will fraudulently suppressed by the defendant, and for the production of the will and directions as to probate of it, and the defendant denied knowledge of the will, *held*, that the will must first be proved, and, though the judge in chancery had jurisdiction to grant probate, it would not be discreet to do so, and the matter must be referred to the Probate Division.—*Pinney v. Hunt*, 6 Ch. D. 98.

See TRUST.

PROFITS.—See PARTNERSHIP; SPECIFIC PERFORMANCE, 1.

PROMISSORY NOTES.—See HUSBAND AND WIFE, 2.

PROOF.—See BANKRUPTCY, 3.

PROVISO.—See COVENANT, 1, 2.

## REALTY AND PERSONALTY.

A sale of real estate, one-eighth of which was owned by Mrs. Q., a married woman was ordered by the Court in a suit for partition. The owner of the other shares offered to buy the one-eighth; and the court ordered him to pay into court the price therefor. This he did; but before a conveyance was made, Mrs. Q. died. Q., the husband, took out administration. *Held*, that, by the Partition Act, 1868, § 8, the £1,200 must be considered as realty, and go to the heir subject to the husband's rights by the curtesy.—*Mildmay v. Quicke*, 6 Ch. D. 553.

See BEQUEST; ELECTION; TRUST.

RESIDUARY LEGATEE.—See WILL, 4.

## REVERSION.

Case where the Court of Equity refused to set aside the sale of a reversion by a young man as soon as he became of age, on the ground of inadequacy of price, and the fact that he had no separate legal adviser in the transaction. Powers and practice of the court in this regard considered.—*O'Rourke v. Bolingbroke*, 2 App. Cas. 814.

See TENANT FOR LIFE, 2.

SALE.—See REVERSION; STOPPAGE IN TRANSITU.

## SEISIN.

In 1864, R. died intestate, being seised in fee of freehold houses. A., his sole heir-at-law, did not enter into possession; but R.'s widow, under colour of a pretended will, unlawfully entered, and remained in possession till 1869, when she died, having devised the estates to the defendants, who entered, and remained from that time in possession. A. died in 1871, and by will dated in 1870 devised to plaintiff "all real estate (if any) of which I may die seised." *Held*, that the seisin in law which A. had during her life was lost at her death, and, as the will must be construed according to the technical sense of the word "seisin," the plaintiff was not entitled.—*Leach v. Jay*, 6 Ch. D. 496.

SEPARATE ESTATE.—See HUSBAND AND WIFE, 2; SETTLEMENT, 2.

## SETTLEMENT.

1. By a settlement made between a widow, her intended second husband, and a trustee for her children by her former marriage, entered into in contemplation of her marriage, the widow covenanted to surrender a certain copyhold messuage to the said trustee, to hold for her benefit during her life, and at her death for the said children; and the intended husband consented thereto. No surrender was, however, made; and, on her death, she devised the messuage. *Held*, that the children by the former marriage could enforce the covenant.—*Gale v. Gale*, 6 Ch. D. 144.

2. C. contracted for the purchase of a flax-spinning mill, and then made a partnership with one R.; and they carried on the business as partners. C. also carried on a like

## DIGEST OF ENGLISH LAW REPORTS.

business at another place. In November, 1866, C. being then, as afterwards appeared, in insolvent circumstances, married; by an ante-nuptial settlement, it was recited that C. was indebted to his intended wife in the sum of £20,000; and C. covenanted with the trustees therein that, on or before Dec. 25, 1867, he would pay them the said £20,000; that he would become possessed in fee of the said mills; and that the trustees should then lend C. the £20,000, receiving therefor a mortgage of the mills. The £20,000 was to be held for the benefit of the wife for life, remainder to C. for life, or until (*inter alia*) his bankruptcy, remainder to the children. In default of children, the wife had, during C.'s life, a power of appointment by will. It was not true that C. owed his intended wife anything. C. acquired the fee in the mills; and in 1869 the mortgage to the trustees was executed, reciting that the trustees had advanced C. £20,000 thereon; but, in fact, no money passed. In December, 1872, C. became bankrupt, and his trustee in bankruptcy prayed that the indentures of 1866 and 1869 might be declared void. It appeared that Mrs. C. was a foreigner, and knew very little English, and that she did not understand any thing of the marriage settlement, except that she was to have £20,000. She was ignorant of the recital about the debt and of her husband's insolvent condition at the time of the marriage. *Held*, that the settlement and mortgage were good against the creditors, so far as the wife and children were concerned.—*Keran v. Crawford*, 6 Ch. D. 29.

3. A covenant in a marriage settlement to settle after-acquired property in a certain manner for the wife and children of the marriage was *held* to apply only to property acquired during the marriage, and did not apply to property coming to the widow after the husband's death.—*In re Campbell's Policies*, 6 Ch. D. 686.

4. In a marriage settlement, on the marriage of his daughter, in 1833, N. covenanted that one-third of his property should, on his death, be settled to his daughter and her husband for their respective lives, and then to their children in equal shares. A daughter of this marriage died in 1861, leaving a husband, who died before 1871, and two children. N. died in 1871, leaving a will, by which he directed his "just debts" to be paid, gave several legacies, and finally gave a sum named and a part of the residue to trustees for his nephews and nieces, and the two children of the grand-daughter above-mentioned, in equal shares. The will made no mention of the marriage settlement. *Held*, that the children must elect whether to take under the settlement or under the will. The liability under the settlement was not to be reckoned among the "debts" of the testator.—*Bennett v. Houldsworth*, 6 Ch. D. 671.

5. In ante-nuptial settlement, H., the in-

tending husband, made a covenant that in case, during the joint lives of himself or his intended wife, "any future portion or real or personal estate" should come to or devolve upon her or him in her right, under a certain will named, or any other will, donation, or settlement, or in any manner, "whether in possession, reversion, remainder, contingency, or expectancy," the husband, and all other necessary parties, would concur with the wife in all reasonable acts to settle "all such future portion, real or personal estate," according to the settlement then being made. The intended wife was entitled at that time, contingently on the happening of two events, to a fund under the will named. These two events happened during her coverture. *Held*, that this fund was subject to the settlement by force of the above covenant.—*In re Mitchell's Trusts*, 6 Ch. D. 618.

6. By a post-nuptial settlement, a husband and wife settled property belonging to the wife to the use of the wife during life, with power of appointment by will in the wife, and, in default of such appointment, to the use of her children. The wife had power during her life to lease at rack-rent, which power was to continue in the trustees for twenty-one years after her death; and the trustees could, with her consent, during her life, sell and exchange the property, and, after her death, could sell and exchange it in their discretion. There were children. *Held*, that the settlement was for valuable consideration, under 27 Eliz. c. 4, and good against a subsequent mortgage.—*In re Foster and Lister*, 6 Ch. D. 87.

See HUSBAND AND WIFE.

## SHERIFF.

*Held*, that a sheriff had made in substance a levy, and was entitled to his poundage and fees, where he went to the debtor's house with a warrant and demanded payment, and told the debtor he should go on to sell if the amount was not paid, and the debtor paid.—*Bissicks v. The Bath Colliery Company, Limited*. *Ex parte Bissicks*, 2 Ex. D. 450.

SHIFTING CLAUSE.—See CONSTRUCTION.

SLANDER.—See LIBEL AND SLANDER.

SOLICITOR.—See ATTORNEY AND CLIENT.

SPECIFIC BEQUEST.—See BEQUEST; WILL, 7.

## SPECIFIC PERFORMANCE.

1. An agreement for a lease for thirty years was duly executed Sept. 5, 1876, but it did not state when the lease was to begin. It appeared that the proposed lessor knew the purpose for which the premises were leased and to be used; but he refused to complete the lease, and the lessee was kept out for a good many weeks. On a suit for specific performance and for damages, *Held*, that the agreement was a sufficient memorandum under the Statute of Frauds, and under it the lease must be held to commence immediately, and that there must be specific performance and damages for the plain-

## DIGEST OF ENGLISH LAW REPORTS.

tiff's loss of profits in the business which he leased the premises to carry on, during the time he was kept out.—*Jaques v. Millar*, 6 Ch. D. 153.

2. Dec. 23, 1861, M. took a lease from A. of certain premises for ten years, with the option in M. at any time during the term to purchase the premises for £3,500, upon payment of which to A. the lease should determine, and M. should be entitled to an assignment thereof. Jan. 23, 1863, A. mortgaged the premises to G. In July, 1867, after some negotiations looking to a purchase by M., the latter, by his solicitor, gave notice to A. and G. that he intended to purchase. A draft of a conveyance of the premises to M. was prepared, but was not completed, owing to a failure between A. and G. to agree as to whom the purchase money should be paid. This was the subject of a correspondence between July, 1867, and March, 1868. In July, 1868, G. gave M. notice to pay the rent to him; and M. made him some payments at odd times, the receipts whereof, both before and after the date for the termination of the lease, were generally expressed to be for rent. In November, 1872, A. went into bankruptcy; and, May 1, 1873, the trustee in bankruptcy informed M. that he proposed to sell the premises, and gave M. the first chance. M. said nothing about having already agreed to purchase until after a second interview, when he set up the claim, and in July, 1873, filed his bill for specific performance. Therein he set up the additional fact, that he had, with the knowledge of both A. and G., expended about £300 in improvements on the premises since 1867. *Held*, that the optional clause in the lease, followed by the notice given in 1867, formed a good contract; but that M., through his delay in acting from March, 1868, to May, 1873, had lost his right to specific performance, and the fact that he was in possession did not alter the case, as he was in during that time, not under the contract as purchaser, but as tenant under the lease.—*Mills v. Haywood*, 6 Ch. D. 196.

See FRAUDS, STATUTE OF, 1; LEASE.

STATUTE.—See BANKRUPTCY, 1; INJUNCTION, 1; INNKEEPER.

STATUTE OF FRAUDS.—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.—See LIMITATIONS, STATUTE OF.

STOPPAGE IN TRANSITU.

W. a trader in Falmouth, purchased goods of B., a merchant in London. On Oct. 27, 1876, B. sent an invoice to W. The goods were put on board the same day. The steamer sailed October 29, and arrived at Falmouth October 31, when the goods were put into the warehouse of C., wharfinger and agent of the steamer company. In the evening of October 30., or the morning of October 31, the bill of lading arrived. October 30, W. absconded, and November 4, he was adjudged bankrupt. The same day,

B. telegraphed to C. not to deliver the goods. It appeared that C. was in the habit of receiving goods and holding them at the risk of the consignee, and that he had the exclusive right as against the steamer company of delivering the goods. One condition of delivery was, that the freight should be paid. C. testified that he considered himself in all cases the agent of the consignee from the time of the arrival of the goods on the wharf. *Held*, that the goods were still in transit when B's message arrived. C. was not agent of the consignee.—*Ex parte Barrow. In re Worsdell*, 6 Ch. D. 783.

## TELEGRAPH.

*Held*, affirming the decision of the Common Pleas Division, that an action cannot be maintained against a telegraph company by the receivers of a telegram, for negligence in the delivery thereof, in consequence of which negligence the receivers suffer damage.—*Dickson v. Reuters Telegraph Co.*, 3 C. P. D. 1; s. c. 2 C. P. D. 62.

## TENANT FOR LIFE.

1. I. N., under a trust, tenant for life, impeachable for waste, cut trees "in due course of management" only, paid the proceeds into court, and received the income therefrom for her life. *Held*, that the next tenant for life, who was not impeachable for waste, was entitled to have the sum in court paid out to him.—*Loundes v. Norton*, 6 Ch. D. 139.

2. A testator gave his property, consisting *inter alia*, of leasehold estates, a part being leased for lives and a part for years, to trustees, in trust for his son W. for life, remainder in tail male. The son was one of the trustees. The will provided for the renewal of leases for lives only. W., the tenant for life, purchased the reversion of a lease for lives (of which W.'s was one), and it was conveyed to the trustees to the uses of the will. He also purchased the reversion of a similar estate, which was conveyed to himself upon the trusts of the will; the reversion of certain leases for years, which were conveyed to himself upon the trusts of the will; and a similar estate, which was conveyed to him absolutely, with no mention of the trusts of the will. All these leases were parts of the estates settled by the will. The purchase money for all these estates was paid by W. personally, and there was evidence that he expressed an intention to charge the same on the estates in his favour. The purchases were all of advantage to the residuary estates. The question was, whether the personal representative of W. was entitled to be repaid the sums paid by W. for these reversions. *Held*, that he was entitled to repayment; that the reversion of the leasehold conveyed to W. absolutely belonged to the personal representative of the tenant in tail; and that this personal representative was entitled to an interest in the lease for years, the reversion of which

## DIGEST OF ENGLISH LAW REPORTS.

was conveyed upon the trusts of the will, equal to the value of that lease to the tenant in tail.—*Isaac v. Wall*, 6 Ch. D. 706.

TENANT IN TAIL.—See TENANT FOR LIFE, 2.

TITLE-DEEDS.—See ATTORNEY AND CLIENT, 2.

TRESPASS.—See COVENANT, 2.

## TRUST.

G. gave freehold and copyhold estates, and also personal estate, to two trustees, in trust as to the real estate to sell it, and stand possessed of the proceeds of it, together with the personal, in trust for his wife for her life, and then for his son C. absolutely. The wife and one of the persons named as trustees died in the testator's lifetime. The testator died March 7, 1867. The other person named as trustee renounced probate, and did not act as trustee, though he made no formal disclaimer of the trust. He died in 1870. May 2, 1867, the son C. took out letters of administration with the will annexed, and partly administered. C. received the rents of the real estate, but never entered on the copyhold, and no tenant was admitted thereto. He gave no leases, the property being let on yearly tenancy. Jan. 18, 1876, he died intestate. His next of kin took out letters on his estate, and claimed that the real estate must be treated as converted. His heir-at-law claimed it, on the ground that C. had elected to take it as real estate. *Held*, that, when the person named as trustee renounced probate, the legal estate devolved on C., and that, independently of that, C. must be held to have elected to take the property as real estate.—*In re Gordon. Roberts v. Gordon*, 6 Ch. D. 531.

See ELECTION; FRAUDS, STATUTE OF, 2.

TRUSTEE.—See HUSBAND AND WIFE, 1; TENANT FOR LIFE, 2.

## VENDOR AND PURCHASER.

A tenant for life without power to lease, undertook to grant a sixty years' lease at 6d. rent, with a covenant for quiet enjoyment, the lessee to erect a house, as he in fact did. The lessee died, and his son paid rent to H., who had come into possession of the fee. Subsequently, H. conveyed the property to the plaintiff, subject to the sixty years' lease, which he supposed valid. The plaintiff sued for immediate possession. *Held*, that he was entitled.—*Smith v. Widdlake*, 3 C. P. D. 10.

See INJUNCTION, 2; STOPPAGE IN TRANSITU.

VENUE.—See JURISDICTION, 3.

VESTED INTEREST.—See WILL, 2.

VOLUNTEER.—See SETTLEMENT, 1, 6.

WASTE.—See TENANT FOR LIFE, 1.

WATERCOURSE.—See MINE, 2.

## WILL.

1. A testator gave "all that part of Rigby's estate, purchased by me, consisting of L., F., K., G., B., and M., being six closes, with the mines thereunder, to his son for life, with power of appointment by will. The son, by his will, recited that his

father left him "all that part of Rigby's estate purchased by him," with power of appointment, without enumerating the closes in the recital. He then proceeded to appoint, under the power in his father's will, all the property "described as that part of Rigby's estate purchased by my said father, consisting of L., K., F., and M." except the mines, in a certain manner. The mines he appointed otherwise. There was no other mention of the omitted closes G. and B., which lay between those named in the appointment. *Held*, that the whole of the six closes were duly appointed.—*Travers v. Blundell*, 6 Ch. D. 436.

2. Testator left £6,000 in trust for his two daughters J. and A., for their respective lives, in equal moieties, and "from and immediately after the several deceases of each of them leaving lawful issue or other lineal descendants her or them surviving," upon trust to pay, assign, and transfer the principal fund "of her or them so dying unto her or their child or children, or other lineal descendants, respectively, . . . such child or children, or other lineal descendants, to take *per stirpes* and not *per capita*, . . . to be paid . . . to them respectively when and as they respectively shall attain the age of twenty-one years." The income to be applied meantime, if necessary, for their support; "nevertheless, the . . . shares of the said child or children," in the principal, "shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents." In case a daughter should die without leaving "issue or lineal descendants her surviving," there was a gift over to the other daughter and her issue and lineal descendants, in similar form; and, in case both daughters should so die, a gift over to third persons. *Held*, that the children of a daughter who died before their mother's death did not take.—*Selby v. Whittaker*, 6 Ch. D. 239.

3. A testator gave property to trustees for sale, and to stand possessed of the proceeds, to pay his son £3,000, and to invest £28,000, and pay the income of £10,000 thereof to his widow during widowhood, and pay the income of six portions, of £3,000 each, to his six daughters respectively and their children. At the death or marriage of the widow, the £10,000 was to fall into the residue. The residue was to be divided "into as many equal shares as I shall have children living at the time of the death or second marriage of my said wife (which shall first happen), or then dead, leaving issue;" £1,000 out of one share was to be held in trust for his son and his son's wife during their respective lives, and then go to their children. The balance of the share was to be paid to the son. One daughter's share was to be held in trust; the shares of the others to be paid to each of them living at the decease or second marriage of the widow. There was a provision that any advances made should be deducted from the amount



## DIGEST OF ENGLISH LAW REPORTS.

of residue due the child to whom the advance had been made. *Held*, that the son was entitled to the £3,000 at once, although he was indebted to his father in a sum nearly equal to his share of the residue; and that the words "living at the time of the death or second marriage of my said wife" must be struck out, as inconsistent with the rest of the will; so that the children living at the testator's death took vested interests in the residue.—*Smith v. Crabtree*, 6 Ch. D. 591.

4. Testator began as follows: "As to my estate, which God has been pleased in his good providence to bestow upon me, I do make and ordain this my last will and testament as follows (that is to say)." He then devised a farm; then, in an informal way, another farm; he then made seven money bequests and a gift of shares in a company, gave his executors £100 each, and made M., R., and O. his "residuary legatees." He possessed other freehold lands besides those mentioned in the will. *Held*, that such lands passed to M., R., and O., as "residuary legatees."—*Hughes v. Pritchard*, 6 Ch. D. 24.

5. Testator gave his brother J. S. all his real and personal estate, with full power to give, sell, and dispose of it in any way he should see fit, and appointed him sole executor. The will then proceeded thus: "But provided he shall not dispose of my said real and personal estate, or any part thereof, as aforesaid, then, and not otherwise, I do hereby give, devise, and bequeath my said real and personal estate, or such part or parts thereof as he shall not so dispose of, in the manner following." The testator then proceeded to dispose of his property by a series of trusts, entails, and contingent remainders; and, after some specific legacies, gave to H. and D., two of the beneficiaries, the household furniture, &c., to hold in trust as heirlooms for whoever should succeed under the provisions of the will to the property in the house; gave the residue of his property to the said H. and D., upon trust to sell and convert "with all convenient speed after the death of the survivors" of himself or his said brother J. S.; and the said H. and D. were, in this part of the will, appointed executors. The expression, "the survivor of myself and my said brother" J. S., occurred in several places in the will. J. S. died in the testator's lifetime. *Held*, that the gift to J. S. was a gift for life, with power of appointment and a gift over on J. S.'s failure to appoint, or on his death in testator's lifetime; and this latter event having happened, the gift over took effect on the death of the testator.—*In re Stringer's Estate*. *Shaw v. Jones-Ford*, 6 Ch. D. 2.

6. A testator recited that his son had become indebted to himself in various sums, and bequeathed to the son the sums mentioned, and released him from payment thereof. Between the date of the will and the testator's death, the son became still further indebted to his father. *Held*, that these sums were not covered by the will, under

the Wills Act (1 Vict. c. 26).—*Everett v. Everett*, 6 Ch. D. 122.

7. A testator gave, devised, and bequeathed "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle J. M." to the defendants. He bequeathed to the plaintiff the residue of his personal estate. Between the date of the will and the testator's death he received £800 from his uncle's estate, and invested £600 thereof in railway stock. He purchased before his death £3,500 more of this stock; and at his death the whole £4,100 stock was standing in his name. *Held*, that the defendant was entitled to the £600 stock.—*Morgan v. Thomas*, 6 Ch. D. 176.

8. A testator provided that his residuary estate should be divided in to sevenths, gave one-seventh to each of his two sons absolutely, and the remaining five-sevenths to trustees to pay the income to his five daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, during their respective lives, in equal shares. Upon the decease of Elizabeth, the trustees should pay one-fifth of the fund to the children of Elizabeth; upon the decease of Sarah, one-fifth to the children of Sarah; upon the decease of Eliza, one-fifth to the children of Mary; and upon the decease of Hannah, one-fifth to the children of Hannah. The testator made mention in a subsequent part of the will "of the issue of any of" his daughters, without discriminating. *Held*, that the will must be construed by interpolating a provision for the children of Eliza on her death similar to that made for the others, and a clause stating that the provision for the children of Mary should take effect on the death of Mary, instead of on the death of Eliza.—*In re Redfern*. *Redfern v. Bryning*, 6 Ch. D. 133.

See CONSTRUCTION; DEVISE; SEISIN; SETTLEMENT, 4; TRUST.

## WORDS.

"Approved."—See CONTRACT.

"Eldest Son."—See CONSTRUCTION.

"Felon."—See LIBEL AND SLANDER.

"Landlord or other person to whom rent is due."  
—See BANKRUPTCY, 1.

"Seised."—See SEISIN.

"Without leaving lawful issue."—See DEVISE.

## CORRESPONDENCE.

To the Editor of CANADA LAW JOURNAL.

SIR,—With reference to your late paper on "Dissenting Judgments," it seems to me that the views therein expressed, and the objections of the "Legal News" would be equally satisfied, by simply

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

stating in the head note of a reported case, that Judges A. & B. dissented from the decision of their brothers. Thus, the opinion of the minority would not be misrepresented.

Yours truly,  
G. A. W.

**LAW STUDENTS' DEPARTMENT.**

*To the Editor of CANADA LAW JOURNAL.*

SIRS.—I notice that you have commenced publishing "Examination Questions" for the aid of law students. As yet you have given none of the questions of the Primary.

Could you not publish some of the classical and mathematical papers, and thereby greatly aid many students who have not, as yet, passed the primary?

Yours, &c.,  
J. L. H.

[We should be glad to oblige our young friends in this matter, but we have not space. That which is at our disposal must be used for matters of more strictly professional interest. —ED. C. L. J.]

**EXAMINATION QUESTIONS.**

We continue the publication of Os-  
goode Hall Examination Questions.

FOR CERTIFICATE OF FITNESS: EASTER  
TERM, 1878.

*Equity.*

1. What is meant by the doctrine of Illusory Appointments? Give an illustration.

2. In the case of a parol contract for the sale of lands for \$1,000, and of a parol contract for the sale of goods for \$1,000, what effect, if any, has the payment of the pur-

chase money in each case? Give authority for your answer.

3. State the general principles on which the Court proceeds in decreeing or refusing to decree specific performance of awards.

4. In the case of a parol contract for the sale of lands, under what circumstances does possession of the lands in question amount to such performance as to take the case out of the statute?

5. A cause being at issue more than three weeks before the commencement of the examination and hearing, at the place where the venue is laid, in what different ways (if at all) may the defendant have the case brought on for hearing?

6. What is the rule as to evidence being or not being admissible according to the course taken by the defendant?

7. A person desires to establish that he is the legitimate child of his parents. Is there any way by which he can have the matter judicially investigated and declared? And if such declaration were obtained, what would be its effect? Give authority for your answer.

8. How may a creditor of one member of a firm obtain payment of his claim out of the partnership assets?

9. A. leases certain lands to B., the lease containing a proviso that B. should be at liberty to purchase the lands during the term upon giving a certain notice, and upon payment of a sum named upon a named day. B. gives the notice, but does not pay the money on the exact day named, but tenders it on the next day. A. refuses to accept the money, or to carry out the purchase, on the ground of B.'s default in payment. Give your opinion as to whether or not B. can compel A. to convey the land.

10. A person is tenant of lands adjoining other lands owned by himself, and with no fraudulent intent removes the line fences which alone marked the boundary. At the expiry of the lease it becomes impossible to shew the position of the boundary between the two parcels. To what land is each entitled?

11. What is meant by "ademption of legacies?" Give an illustration.

**LEITH'S BLACKSTONE.—REAL PROPERTY STATUTES.**

1. Grant to A for 50 years', remainder to the heirs of B in fee. Is this a good remainder?

2. What is the effect of the statutory provisions as to auction sales of real estate?

3. Can one joint tenant bring any action

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

against his co-joint tenant in respect of the joint estate? If so, for what, and under what circumstances?

4. What do you understand by an estate in co-parcenary? Can it now arise? Explain.

5. In what different ways may prescription be pleaded? What must be proved under each plea?

6. Explain and illustrate the maxim: *Falsa demonstratio non nocet*.

7. Discuss the question as to whether it is necessary that a deed should be signed as well as sealed.

8. In what different ways may dower be barred?

9. What are the rules by which it may be determined whether covenants run with the land?

10. What was deemed to be the necessity for the Statute of Enrolments? What was the effect of it? What was substituted for it? Is any analogous statute now in force?

*Leake on Contracts.*

1. Defendant represented to plaintiff that a horse he was about to sell by auction was sound, and next day the plaintiff, relying on the representation, purchased the horse at auction, at which it was put up for sale, without a warranty. Discuss the question of the liability or non-liability of the defendant on his representation and the principles on which the same depends.

2. On what grounds may a foreign judgment be questioned in our Courts?

3. A by writing agrees to transfer a farm to B, on certain specified terms. What would be the effect of a contemporaneous oral agreement, that the written agreement was to be void if C, the landlord of the farm, did not consent?

4. A is the holder of shares in a bank; the bank makes false representations to B which induce him to buy the shares of A. What effect will this have on the validity of the sale and purchase?

5. What effect will the insanity of one of the parties to a contract have (a) on the validity, (b) on the right to compel specific performance of a contract?

6. What is the effect, and why, of a promise on the part of a holder of an overdue note, to extend the time on payment of six per cent. interest?

7. A, in consideration of \$1,000, binds himself in a bond conditioned to make a lease for the life of the obligee before a day certain, or to pay him \$1,000, and the obligee dies before the stated time. What is the effect of the bond?

8. In how far will a release, not under seal, but upon good consideration, be a good defence to an action on a contract, other than a bill of exchange or promissory note? Explain your answer fully.

9. Who was the proper party at Common Law to sue on a contract of a deceased person, the benefit of which he had assigned, during his lifetime, and who now? Explain your answer.

10. What would be the measure of damages in an action for breach of warranty of description of goods contracted for?

*Smith's Mercantile Law.—Common Law Pleading and Practice.—The Statute Law.*

1. Is community of profit a complete criterion of a contract being one of partnership? Explain your answer fully.

2. Under what circumstances, and why, will Courts of Equity reform joint securities executed by partners, so as to bind executor of a deceased partner?

3. Under what circumstances will an action of *assumpsit* lie against a Corporation? State fully the ground of your answer.

4. In how far is the rule that "*there can be no indemnity between wrongdoers*" applicable to the case of an agent obeying the commands of his principal, and seeking indemnity therefor?

5. What distinction is there between the liability of principal and agent respectively for acts done by the agent, in the name of his principal (a) in cases of contract, and (b) in cases of tort?

6. Is there any, and if so what, difference between the law relating to promissory notes and that relating to other simple contracts in regard to consideration?

7. If the exportation of articles of which a cargo is to consist, be prohibited, what effect will this have on the contract of affreightment? Will it make any difference if prohibition by foreign Government? Explain your answers.

8. What is meant by *adjustment* of loss in marine insurance cases, and what effect has it on the defence of the underwriter against the claim in respect to which it takes place?

9. A plaintiff is entitled to sign final judgment by default in an action of replevin. What considerations should operate on his decision in regard to signing final judgment then, and what other course is open to him? Explain your answer fully.

10. In an action of contract the non-

## REVIEWS.

joinder of a person as co-defendant is pleaded in abatement, what course is open to the plaintiff as to amending, and what will be the consequence of his amending, as to costs or otherwise?

## REVIEWS.

**THE CONSTABLES' MANUAL**, being a summary of the Law, relating to the rights, powers and duties of Constables. By S. R. Clarke, of Osgoode Hall, Barrister-at-Law. Toronto: Hart & Rawlinson, 1878.

This useful little book is, in effect, a continuation of the author's *Magistrates' Manual*; but is published separately for the benefit of Constables, who can thus obtain for a small sum the information they require on most of the points on which difficulties are likely to arise in the discharge of their duties. The author refers frequently to "The Constables' Guide," published many years ago by Mr. Adam Wilson, Q. C., now the Senior Puisne Judge of the Queen's Bench. Constables in this country are not perhaps, as a class, as dense as story books say that their brethren in Great Britain are, but we can well fancy that a daily dose of this manual would do them no harm. We recommend them to try it. They might spend some of their fees to worse advantage.

**MAYNE'S TREATISE ON DAMAGES.**

Third edition. By John D. Mayne, of the Inner Temple, Barrister-at-Law, and Lumley Smith, of the Inner Temple, Barrister-at-Law, late Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1877.

The first edition of this standard work was published in 1856, and the second in 1872. The last edition, somewhat more bulky than its predecessor, is in many respects a new book, the additions, alterations and omissions being numerous. Owing to the large number of English and Irish cases that required notice, no American cases decided since the previous edition are referred to. In fact, these are so multitudinous that it

would have been impossible, with any regard to the aim of the author, to have noted them, even in the most cursory manner.

This text book is so well-known, not only as the highest authority on the subject treated of, but as one of the best text books ever written, that it would be idle for us to speak of it in the words of commendation that it deserves. Suffice it to say that its reputation will not suffer from the labours of the learned authors in this last edition. It is of course a work that no practising lawyer can do without; and probably before this is read all those who pretend to have *any* "implements of trade," they will have provided themselves with a copy of it. If not, we should advise them at once to procure it. The excellence of the matter is equalled by the excellence of the manner in which its enterprising publishers present it to the public.

**AMERICAN LAW REVIEW.** Boston: Little, Brown & Co. April, 1878.

This is one of the most welcome of our exchanges. The number before us begins with a sketch of a new plan of electing a President for the United States. The writer advocates election by lot. The present mode can scarcely be said to be perfect. Our neighbours are beginning to find that democracy is not such a splendid system after all. They may be said, however, to be still "young and foolish," being only a hundred years old, and will learn wisdom as they grow in years. The best part, perhaps, of this publication is the book reviews. They are of the most discriminating character—full, fair, and candid. Other interesting matters of information are the Digests of English and American Cases, quarterly list of new law books, summary of events, &c.

**THE ENGLISH QUARTERLY REVIEWS AND BLACKWOOD.** Leonard Scott Publishing Company: 41 Barclay Street, New York. Hart & Rawlinson: Toronto.

There is no literary series that has been so uniformly excellent as these.

## REVIEWS.

They still hold sway in England, and are as vigorous as their many imitators started in later years. It may not be amiss to give a sketch of their origin and general scope.

The *Edinburgh Review* was commenced in the year 1802. Its founders and earliest contributors were Sidney Smith, Francis Jeffrey, and Brougham, the latter of whom is said to have written six articles in the first number. In those days, however, some of the articles were very short—not more than two or three pages in length; sometimes a number contained nineteen articles, now there are rarely more than ten. In the first twenty numbers Jeffreys wrote seventy-five articles, Sidney Smith twenty-three, Francis Horner fourteen, and Brougham eighty. Its political principles were in accordance with those of the Whigs, and they were advocated with such ability that the Tories felt the necessity of establishing a rival organ, and in 1809 the first number of

The *Quarterly Review* made its appearance. Its success was immediate; the circulation is said to have risen soon to 12,000 copies. Wm. Gifford was the editor; and among its contributors were Canning, Walter Scott, John Wilson Croker, John Hookham Frere, and Southey. Jeffrey of the *Edinburgh*, and Gifford of the *Quarterly*, held absolute sway in the critical world for many years. Gifford died in 1826; Jeffrey in 1850. Lockhart, the son-in-law of Walter Scott, succeeded Gifford as editor.

The *Westminster Review* was started in 1823 by Jeremy Bentham, with Sir Wm. Molesworth, John Bowring, James Mill, and Roebuck for principal contributors, as the organ of the Reformers, advocating Public Economy, Free Trade, Law Reform, and Catholic Emancipation. Subsequently the *London Review* came out in the same cause. The *Foreign Quarterly Review* made its appearance in 1827, and occupied itself, as implied by its name, with Continental Literature. In 1836 the *London* and the *Westminster* were combined, and published as "*The London and Westminster Review*." A change of proprietorship occurring in 1840, the word "*London*" was dropped, and the original title

"*Westminster Review*" restored; and finally, in 1846, the *Foreign Quarterly Review* was united with the *Westminster*, and at the same time the section known as Contemporary Literature was commenced, giving short notices of recent works, both foreign and domestic.

The *British Quarterly Review* was commenced in 1845. It was founded by the Rev. Dr. Vaughan, a distinguished Congregational minister, who considered that the numerical strength and literary resources of the Nonconformists justified the establishment of a first-class quarterly review.

*Blackwood's Magazine* was projected by Wm. Blackwood, a bookseller in Edinburgh, in the year 1817, in the interests of Toryism. The *Edinburgh Review* had proved so potent an auxiliary of the Whigs, that it was felt important to establish some check to its influence in Edinburgh. W. Laidlaw and Thomas Pringle, with occasional material furnished by Walter Scott, took charge of the early numbers; but the editorship soon passed into the hands of Professor Wilson (the far-famed Christopher North), round whom rallied a band of young men of talent, scholarship and ambition, who soon gave the *Magazine* an influence and reputation which have attended it up to the present time. Wilson died in 1854.

THE VOTERS' LISTS ACT WITH NOTES; together with some remarks upon the Voters' Lists Finality Act, by the Junior Judge of the County of Simcoe. Barrie: Wesley & King. 1878.

This is a most useful little work. Judge Ardagh's "Suggestions to Municipal Officers; relating chiefly to their duties in respect to Voters' Lists, was so well received that he was encouraged to proceed further. Most accurate in his information, which is given with great clearness, we shall hope to receive from the pen of this author, when he can find time, a more ambitious volume on this or some other subject with which he is familiar. We recommend all who are interested in the subject, and they are legion, these election times, to procure a copy of it.

## LAW SOCIETY, HILARY TERM.



## Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 41st VICTORIA.

During this Term, the following gentlemen were called to the Bar, viz. :—

GEORGE FERGUSSON SHEPLEY.  
 WILLIAM JAMES CLARKE.  
 WILLIAM EGERTON HODGINS.  
 JAY KETCHUM.  
 ROBERT SHAW.  
 HAMILTON PARKE O'CONNOR.  
 WILLIAM CAVEN MOSCRIP.  
 JAMES JOSEPH ROBERTSON.

The following gentlemen were called to the Bar under 39 Vict. chap. 31. :—

DANIEL O'CONNOR.  
 JOSEPH BAWDEN.

The following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks :—

*Graduates.*

ALEXANDER DAWSON, B.A.  
 THOMAS DICKIE CUMBERLAND, B.A.,  
 WILLIAM BANFIELD CARROLL, B.A.

*Matriculants.*

FRANCIS BADGELEY WILLIAM MOLSON GILBERT LILLY.

JOSEPH. MARTIN.  
 J. A. C. REYNOLDS.

*Junior Class.*

HUGH ARCHIBALD MACLEAN.  
 WILLIAM BURGESS.  
 LOUIS F. HRYD.  
 JAMES FOSTER CANNIFF.  
 JOHN DOUGLAS GANSBY.  
 GEORGE CORRY.  
 EDMUND WALLACE NUGENT.

CHARLES PATRICK WILSON.  
 DAVID MCARDLE.  
 THOMAS HISLOP.  
 WILLIAM ALEX. MCLEAN.  
 ALEXANDER JOSEPH WILLIAMS.  
 JAMES JOSEPH PANTON.  
 WILLIAM MELVILLE SHOEBOOTHAM.  
 JAMES GAMBLE WALLACE.  
 GEORGE MOREHEAD.  
 WILLIAM GEORGE SHAW.  
 ROBERT PATTERSON.  
 HARRY HYNDMAN ROBERTSON.  
 JAMES ALEX. SHETTLÉ.  
 MOSES MCFADDEN.  
 ARTHUR B. FORD.  
 GEORGE HIRAM CAPRON BROOKE.

*Articled Clerk.*

HENRY WHITE.

## PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

## CLASSICS.

Xenophon, Anabasis, B. I. ; Homer, Iliad, B. I. ; Cicero, for the Manilian Law ; Ovid, Fasti, B. I., vv. 1-300 ; Virgil, Æneid, B. II., vv. 1-317 ; Translations from English into Latin ; Paper on Latin Grammar.

## MATHEMATICS.

Arithmetic ; Algebra, to the end of Quadratic Equations ; Euclid, Bb. I., II., III.

## ENGLISH.

A paper on English Grammar ; Composition ; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## LAW SOCIETY, HILARY TERM.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. *Museaus, Stumme Liebe. Schiller, Lied von der Glocke.*

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or,

Virgil, *Æneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and

Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

*1st Year.*—Stephen's Blackstone, Vol. I. Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

*3rd Year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

*4th Year.*—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

N.B.—After Easter Term, 1878, Best on Evidence will be substituted for Taylor on Evidence; Smith on Contracts, for Leake on Contracts.

## DIARY—CONTENTS—NOTES OF RECENT DECISIONS.

## DIARY FOR AUGUST.

1. Thurs Abolition of slavery in the British Empire, 1834.
12. Mon...Dismell made a peer.
13. Tues...Sir Peregrine Maitland, Lieut.-Gov.. 1818.  
Primary examinations (written).
14. Wed...Primary examinations (oral).
17. Sat...General Hunter, Lieut.-Governor, 1799.
20. Tues...Intermediate examinations.
21. Wed...Long vacation ends. Intermediate examinations.
22. Thurs Examinations for certificates of fitness.
23. Fri...Examinations for call.
24. Sat...Examinations for call with honours.
25. Sun...Francis Gore, Lieut.-Gov., 1805.
26. Mon...Trinity term begins. Law Society Convocation meets.
27. Tues...Law Society Convocation meets.
29. Thurs Rehearing term in Chancery begins.
31. Sat...Law Society Convocation.

## CONTENTS.

EDITORIALS :	PAGE
Notes of Recent Decisions.....	209
Concerning Costs .....	210
Privileged Communications.....	211
NOTES OF CASES :	
Court of Appeal .....	212
Queen's Bench .....	218
Common Pleas .....	222
FLATS AND JETSAM .....	227
LAW SOCIETY OF UPPER CANADA .....	228

## Canada Law Journal.

Toronto, August, 1878.

## NOTES OF RECENT DECISIONS.

A number of important and interesting decisions appear by the "speedy notes" published in another place. The profession are much indebted to the enterprise of the Reporting Committee of the Benchers in thus giving the earliest intimation of the latest law.

The cases referred to show, amongst other things, that the happy days when Insurance Companies succeeded in Term after defeats at Nisi Prius seem to have passed away. Judgments are given in no less than seven Insurance cases. In five of them the plaintiffs succeeded. This result will probably be satisfactory to the junior Puisne Judge of the Queen's

Bench who has become a terror to attorneys for Insurance Companies. We are glad to see that the fears of a judgment in favour of the plaintiff in the case of *Pringle v. The Town of Napanee*, owing to some observations of the same learned judge on the argument, have not been realized. The Court very properly took the broad ground that Christianity is a part of the law of this Province, and it is therefore a good defence to an action for breach of contract in not allowing the plaintiff the use of a public hall, that it was intended to be used for the delivery of lectures attacking Christianity.

The case of *McArthur v. Eagleson* is a curiosity in its way, and to the general reader the finding that the plaintiff was not barred by the Statute of Limitations, because the possession of the wife was the possession of the plaintiff, her husband, might seem unsatisfactory. This Enoch Arden of a plaintiff chose to absent himself without leave, and without notice of his being alive, for thirty years. The wife remained on the place, and at the end of seven years married again, "as she well might, &c." It was sufficiently impudent of this silent partner to come back at all and annoy people, and more so to claim a wife, to whom another man was much better entitled; but to claim lands which he had abandoned for more than a quarter of a century, and to assert that he had been in possession of them through the wife whom he had also abandoned, and who was living on the place under the protection of another husband, does seem a happy thought on the part of the plaintiff or his legal adviser; and it shews the advisability of losing nothing for want of a little "cheek." There were, doubtless, weighty arguments inducing the Court to uphold the plaintiff's contention, but as we have not seen the judgments, we cannot properly discuss the



## NOTES OF RECENT DECISIONS—CONCERNING COSTS.

finding. We notice that Mr. Justice Wilson dissented from the opinion of the majority of the Court.

## CONCERNING COSTS.

A story is told by a friend of Campbell the poet, that when visiting at the house of the family, he and Thomas, then about thirteen, were speaking of getting new clothes, and descanting in great earnest upon the most fashionable colours. Tom was partial to green, the other preferred blue. "Lads," said Campbell's father, in a voice which fixed their attention, "if you wish to have a lasting suit, get one like mine." They thought he meant one of a snuff-brown colour, but he added, "I have a *suit* in the Court of Chancery, which has lasted thirty years, and I think it will never wear out." Playing upon the same subject of the traditional length and consequent expensiveness of Chancery cases, Swift in the person of Gulliver, informed the King of Brobdingnag about his father having been ruined by a suit in Chancery, in which, after twenty years' litigation, he had obtained a decree in his favour *with costs*. Now-a-days these anecdotes only remind one of what has been. Suits in Chancery are now disposed of as expeditiously as actions at law, and if, in any instances, they seem to be longer, it is usually because these suits are many-sided, involve various issues between the different parties and contain sufficient material to form the staple of half-a-dozen ordinary common law actions.

However, costs are always a subject of much interest both to the suitor and his professional adviser. Mr. Jacob's happy thought about the pertinacity of counsel has been embalmed in one of the judgments of James, L. J. "I was informed," he says, "forty years ago, by the late Mr.

Izsch, that questions in this Court with respect to the importance attached to them, and the zeal with which they were argued, are in the following ratio:—Practice, first; costs, second; and merits, third and last:—*Attorney-General v. Earl of Lansdale*, 19 W. R. 235. But the point of even these sayings is becoming gradually less appreciated under the improved procedure of the Courts and the disposition manifested by the ablest judges to adjudicate upon the merits, even at the sacrifice of form and precedent. In regard to costs, it may be now said that there are settled rules for awarding these, both at law and in equity, which can readily be applied to each particular case. Although formerly it seems that an astute counsel could beguile a jury into giving him costs with only a farthing damages, as in the oft-cited instance of the Welch counsel, John Jones, whose advocacy almost always resulted in the jury finding "for John Jones, with costs," yet now it is well settled that a jury cannot award costs: *Campbell v. Linton*, 27 U. C. R., 563. And indeed, it is not seemly to discuss such a question before the jury: *Carrick v. Johnston*, 26 U. C. R. 69.

The leading principle, fixed by statute law and by the course of the Court in Equity, is to award costs to the successful litigant. Another principle is that when the relief sought in a superior, can be obtained in an inferior court, no greater costs will be taxed than could have been obtained in the lower forum, and at law a set-off of the defendant's extra costs is provided for by statute, in this Province. The Courts in England have gone to great lengths in allowing costs to "follow the event." It has been held by the House of Lords in *Garnett v. Bradley* just the other day that in an action of slander, where the verdict was one farthing damages, the plaintiff was

## CONCERNING COSTS—PRIVILEGED COMMUNICATIONS.

entitled to his full costs of suit, as a matter of right under the construction of Ord. 55, by which costs are to "follow the event."

There are still to be found in the reports some exceptional cases in Equity, which it is to be hoped will not at all be followed in similar circumstances. Where the only defence set up by the defendant failed in proof and the ground on which the Court decided was not taken in the answer, the Court, though dismissing the bill, refused costs; *McAnnany v. Turnbull*, 10 Gr. 298. A somewhat similar decision was made as to costs at common law in *Thompson v. Leach*, 18 C. P. 150. A plaintiff, who insisted on his legal rights in a case wherein he should not morally do so, was refused his costs in *Landed Estate Company v. Weeding*, 18 W. R. 35. We think it may be safely said that this principle of decision could not now be followed. In *Hawke v. Niagara Ins. Co.*, 24 Gr. 20, costs were refused to the defendants, although the bill was dismissed because they failed on some of their grounds of defence. We submit that this case should not be followed, inasmuch as a defendant is entitled to set up every defence which he deems to be tenable so long as he does not swear falsely to material facts in his answer. This last misconduct has usually been deemed a sufficient reason for withholding costs from the offending party: *McKay v. Davidson*, 13 Gr. 498; *McCrumm v. Crawford*, 9 Gr. 342; *Royal Canadian Bank v. Payne*, 19 Gr. 184. And this seems a reasonable rule so long as the Court requires the defendant to pledge his oath to the truth of his grounds of defence.

It is a matter of congratulation that the rules for the disposition of costs are becoming more settled and certain, and that much of the wrangling formerly in-

dulged in touching this subject is now both unnecessary and inefficacious.

## PRIVILEGED COMMUNICATIONS.

The *Central Law Journal* reports a case of *Belle Barber v. St. Louis Dispatch Co.* The plaintiff's husband had filed a bill for divorce, founded on the alleged adultery of the wife. Before the case came on for hearing, the defendants published in their newspaper the substance of the charges. The defendants claimed that the publication was a fair report of a case before the courts. The Court said:

"The general question here involved is, whether the publication in the newspaper of the defendant belongs to the class of publications called privileged communications; that is, publications which would be libellous, but which are not so because the occasion and manner of the publishing are such as to rebut the inference of malice arising from the publication of matter which on its face is libellous. But the question on which the answer to this depends is not that which has been most discussed by counsel; namely, whether the same rule, in reference to privileged communications, that extends to trials where both parties are before the court, extends also to *ex parte* proceedings. This question has, no doubt, a bearing upon the legal issue before the court; but a solution of it in favour of the appellant will not necessarily involve the conclusion which the appellant desires to reach. Indeed, it may be granted that the general rule is as follows: Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncoloured by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial, or on a preliminary and *ex parte* hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the *ex parte* nature of the proceedings may not destroy the privilege,

—to prevent such a result, there must be at least so much of a public investigation as is implied in a submission to the judicial mind, with a view to judicial action."

"The publication was not merely of the fact that a petition for divorce had been filed; but it purported to give the contents of a petition which had never been brought before the court at any sitting, or with a view to judicial action. No proceedings in open court had taken place, and, in fact, no proceedings in open court ever did take place, in the suit for divorce, from the time of the filing of the petition to the time of the dismissal of the suit. The statements made in this publication were not only of a kind to disgrace and degrade the plaintiff in the estimation of the community, but they impute an act which may be a crime under the statutes of this State. *Prima facie*, the words are actionable (Wag. Stat. 519, §1; *Stieber v. Wensel*, 19 Mo. 513) and their use raises the presumption of malice; that is, not of any actual design to injure, but of that wrongful intention which the law presumes to be the concomitant of an act which it condemns as wrong. This being the case, is there any great public advantage overriding the injury that would ensue in cases of this kind to individuals?

"That injury is apparent. If every paper on which a clerk of court marks the word 'filed' is a privileged communication, and the person who spreads its contents broadcast before the public is exempted from the penalties which the law imposes on those who injure the reputation and property of others, consequences most serious will follow. A court may well pause before it makes a decision to this effect, unsanctioned as such a decision would be by any authority. Papers may be filed, as declarations or petitions, which are filled with libellous matter. Their mere filing is no guaranty that the plaintiff intends to go to trial upon them. They may be so composed as to blast reputations and ruin business. They might be published with the most malicious design, yet, if privileged, the effect would be practically to deprive the injured party of redress. The anomaly, too, would

be presented that, while the law would afford the defendant a remedy against the person who brought the suit (for the latter would be liable in damages for a malicious action), it would afford no redress against the libeller, whose publication may have produced the greater injury. Nor, if a publication is to be privileged, merely because a petition is on the files, is it easy to see why the filing of an affidavit, or deposition, even though it may be totally inadmissible in evidence and may be subsequently stricken from the files, does not confer a like exemption. When a matter is before a court upon a hearing, subject to the control and direction of the court, the right of publication may well be allowed. But where a paper is filed by a private person, perhaps not even with intent to produce an investigation, he who chooses to publish it should do so at his own risk. It is better that a craving after any thing but wholesome news should be disappointed, than a reputation assailed. If the charges of the petition are not baseless, they will soon be made the subject of judicial action, in one form or another; and, when they are made such, the law, from motives of public policy, makes all proper publications in regard to them privileged communications."

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## NOTES OF CASES.

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IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

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### COURT OF APPEAL.

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From Q. B.]

[June 25th.]

McMASTER V. KING.

*Insolvent Act of 1875—Deed of composition and discharge—Estoppel.*

The plaintiffs sued the defendant, a discharged insolvent, for a debt alleged to have been contracted under such circumstances that the imprisonment of the debtor for enforcing payment is permitted by the Insolvent Act.

## C. of A.]

## NOTES OF CASES.

## [C. of A.]

*Held*, reversing the judgment of the Queen's Bench, that the plaintiffs had not precluded themselves from enforcing the claim by having proved it in the ordinary way, and not as a debt contracted by fraud; or by having taken composition notes and accepting payment of one of them.

*W. Macdonald* for the appellant.

*Geo. Kerr, Jr.*, with him *Akers*, for the respondent.

*Appeal allowed.*

From Chy.]

[June 25th.]

**WALLACE V. GREAT WESTERN RY. CO.**

*Railway Company—Specific performance—Covenant to keep a station.*

In consideration of a bonus granted by the municipality, the Wellington, Grey and Bruce Railway Company covenanted to "erect and maintain a permanent freight and passenger station" at Gowanstown. Shortly afterwards he road was leased, with notice of the agreement, to the T. G. & B. Ry. Co., who discontinued the use of the station as a regular station, merely stopping there when there were any passengers to be let down or taken up.

*Held*, affirming the judgment of Spragge, C., that the mere erection of the station was not a fulfilment of the covenant; *Held*, also, that the covenant was binding on the T. G. & B. Ry. Co., and that the municipality was entitled to have it specifically performed.

The decree which enjoined the defendants from allowing any of their ordinary freight, accommodation, express or mail trains, other than special trains, to pass Gowanstown without stopping for the purpose of setting down and taking up passengers was varied by limiting it to such trains as are usually stopped at ordinary stations.

*Boyd, Q.C.*, and *W. G. P. Cassels* for the appellants.

*Bethune, Q.C.*, and *C. Moss* for the respondents.

*Appeal dismissed without costs.*

From Q.B.]

[June 25th.]

**MCDUGALL V. CAMPBELL.**

*Counsel fees—Action for.*

*Held*, affirming the judgment of the Queen's Bench, that when a Barrister who is also an Attorney deals directly with a client, he can recover for his services, even though a part of the service rendered may be for advocacy; but

where a counsel is retained by an attorney he cannot bring an action for his fee.

*Bethune, Q.C.*, for the appellant.

*Dr. Spencer* and *J. McDougall* for the respondent.

*Appeal dismissed.*

From Q.B.]

[June 25th.]

**IN RE BROOKS AND THE CORPORATION OF THE COUNTY OF HALDIMAND.**

*County Council—Obligation to build a bridge—Mandamus—36 Vict., c. 48, sec. 413.*

Section 413 of the Municipal Act of 1873, as amended by 37 Vict. c. 16, sec. 19, enacts that "it shall be the duty of County Councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county."

A bridge over the Grand River, which runs between the townships of Oneida and Seneca, erected at the village of York by a private company, having become out of repair, was abandoned by the company. A distance of twelve miles, from Caledonia to Cayuga, was thus left without any bridge, and a mandamus was applied for to compel the county council to build a bridge at or near the village of York.

*Held*, reversing the judgment of the Queen's Bench, that as there were other bridges over the river, the question whether a bridge should be erected at this particular spot was a matter within the discretion of the county council.

*C. Robinson, Q.C.*, for the appellant.

*M. C. Cameron, Q.C.*, for the respondent.

*Appeal allowed.*

From Q.B.]

[June 25th.]

**BURGESS V. BANK OF MONTREAL.**

*Tax Sale—Description of land sold.*

The Sheriff, on a sale of land for taxes, in 1860, gave to the purchaser a certificate describing the land sold as "five acres of land to be taken from the south-west corner of the south-west quarter of lot 3, in the 11th concession of the Township of Zorra."

Six years afterwards the successor of this sheriff gave a deed describing the land particularly by metes and bounds.

*Held*, affirming the judgment of the Queen's Bench, that the sale was invalid.

*Bethune, Q.C.*, for the appellant.

*Becher, Q.C.*, with him *Sreeth*, for the respondent.

*Appeal dismissed.*

C. of A.]

NOTES OF CASES.]

[C. of A.]

From Chy.]

[June 25th.]

**ATTORNEY-GENERAL V. WALKER.**

Section 155 of the Inland Revenue Act, 1867, enacts that all duties of excise payable under the Act "shall be recoverable . . . in any court of competent civil jurisdiction;" and sec. 32 of the A. J. Act, 1873, provides that "no objection shall be allowed on demurrer; . . . that the subject matter of the suit is exclusively or properly cognizable in a Court of Law."

*Held*, affirming the judgment of the Court of Chancery, that, independently of the question whether the Administration of Justice Act was meant to extend to Crown cases under the above sections, the Attorney-General is entitled to sue in the Court of Chancery for the recovery of excise duties, even if it be a purely legal debt.

The 43rd and 44th sections do not restrict the right of the Crown to sue in respect of frauds committed upon the revenue to the period of one year, or prevent a recovery in a Court of Law, unless a special investigation has been held in pursuance of the Act.

*S. Richards, Q.C., and Fitzgerald, Q.C., for the appellant.*

*Bethune, Q.C., with him Hoyles, for the respondent.*

*Appeal dismissed.*

From Chy.]

[June 25.]

**VANDICAR V. OXFORD.**

The Court of Chancery has no jurisdiction to test the legal validity of a by-law.

The omission in a by-law, which closes up a road, to provide some other convenient road or way of access to the lands abutting on the closed-up road, under section 422 of the Municipal Act of 1873, does not render it void, but only subject to be quashed upon application to one of the Superior Courts of Common Law within a year.

Where, therefore, a bill was filed three years after the passage of such a by-law seeking to have it declared invalid, and asking for compensation:

*Held*, reversing the judgment of Blake, V.C., that the Court of Chancery had no power to interfere.

*Held*, also, that under sec. 373 of the Municipal Act, 1873, the only mode of fixing the compensation was by arbitration.

*Bird, for the appellant.*

*M. Blake, Q.C., for the respondent.*

*Appeal allowed.*

From C.C. York.]

[June 25.]

**WILSON V. GINTY.**

*Liability of subscriber to creditors.—Conditional subscription for shares.*

The plaintiff as a creditor of a railway company, sued the defendant as a shareholder, for the amount remaining due on his shares. It appeared that the defendant had signed the stock book of the company for forty shares upon the faith of an agreement with one L, a provisional director, who was also the principal promoter and director of the company, that he and one M should receive the contract for building the road. There was no proof that the defendant had received any formal notice of the allotment of the shares, but he paid 10 p. c. thereon. He swore that he made this payment because L told him he would not get the contract unless he paid it. He also attended a meeting of the shareholders and seconded a resolution granting an allowance to the directors.

*Held*, affirming the judgment of the County Court, that the payment of 10 p. c. made him a shareholder, and that he could not repudiate his liability to a creditor on the ground that he had not been awarded the contract as L had no power to bind the company by annexing such an agreement to his subscription.

*T. Ferguson, Q.C., for the appellant.*

*T. Kennedy, for the respondent.*

*Appeal dismissed.*

From C. C. Lincoln.]

[June 26th.]

**Re DOUGLAS.**

*Insolvent Act of 1875.—Goods claimed by Insolvent as Administratrix.*

Upon the death of her husband, the Insolvent, who took out letters of administration, continued to carry on the business of a hardware merchant, in which her husband had been engaged, and applied \$4,000 to which she was entitled under a policy of insurance on his life in paying his debts and carrying on the business. Upon her insolvency soon afterwards, the assignee seized certain goods which belonged to her husband and which remained in specie.

*Held*, reversing the judgment of the County Court, that the insolvent was entitled to these goods as administratrix of her husband's estate.

*W. Cassele, for the appellant.*

*Bethune, Q.C., for the respondent.*

*Appeal allowed.*

C. of A.]

NOTES OF CASES.

[C. of A.]

From C. P.]

[June 25th.]

BOICE V. O'LOANE.

*Action on Judgment—Limitation—38 Vict., c. 16. Sec. 11. O.*

*Held*, reversing the judgment of Gwynne J., that Sec. 11 of 38 V., c. 16 O. does not apply to judgments; and an action may still be brought thereon within 20 years under C. S. U. C., c. 78, sec. 7.

C. Robinson, Q.C., for the appellant.

Behune, Q.C., for the respondent.

*Appeal allowed.*

From C. P.]

[June 25th.]

NORTHWOOD V. RENNIE.

*Sale of Goods—Warranty—Statute of Frauds.*

The plaintiff sued the defendant for a breach of warranty of a hay press, which he had agreed to purchase from the plaintiff if it should be capable of pressing into bales 10 tons of hay per day, which the defendant warranted it would do. The machine was delivered to the plaintiff, but upon trial failed to do the stated amount of work, and was returned. The defendant denied the warranty and gave evidence to show that the sale was only on condition. At the close of the plaintiff's case an *onsuit* was moved for on the ground that no money having passed, the plaintiff could not maintain an action for damages, and that the machine having been returned and no money paid, no action would lie; also that the Statute of Frauds was a bar. Leave was reserved to move on the whole case. After discussion as to the position of the case on the evidence, it was arranged that the question to be submitted to the jury was, was there a guarantee by the defendant that the machine should be fit to do the above amount of work. The jury found a verdict for the plaintiff. *Held*, affirming the judgment of the Common Pleas, that the verdict was amply supported by the evidence; and that the arrangement entered into at the trial precluded the defendant from taking the objection that no action would lie on the warranty because there was no sale. *Held*, also, that the plaintiff's right of action was not affected by the Statute of Frauds.

A. Galt, for the appellant.

O. Robinson, Q.C., for the respondent.

*Appeal dismissed.*

From Chy.]

[June 25th.]

STANDARD BANK V. BOULTON.

*Married Woman—Separate Estate.*

A married woman, married in 1852, who was by virtue of her marriage settlement entitled to the legal estate for life, in certain lands after the death of her husband, during his life endorsed a promissory note made by him to secure his liability to the Bank. A bill was filed against her after her husband's death to realize the amount. *Held*, reversing the judgment of Blake, V.C., that she was not liable, as this was not her separate estate within the meaning of 35 Vict., c. 16, s. 1, at the time the note was given.

C. Robinson, Q.C., and Leith, Q.C., for the appellant.

Boyd, Q.C., for the respondent.

*Appeal allowed.*

From C. P.]

[June 25th.]

CAMERON ET UX., V. WAIT.

*Highways—Right to original allowance—Municipal Act.*

Trespass for the removal of a fence placed by the plaintiffs across what was an original allowance for road between lots 8 and 9. The plaintiff who owned the south half of lot 9, claimed to be entitled to this allowance by reason of the Justices of the Quarter Sessions having, in 1837, laid out a road across the South half of lot 9, in lieu, as was claimed, of the original road allowance. In proof thereof, the report of the then surveyor was produced, dated 15th July, 1837, addressed to Justices, reciting the petition of twelve freeholders for the new road, with his certificate of his having examined and surveyed it, and given notice according to law; the road to be fifty feet wide. He also certified as to his having examined the original allowance and found it impracticable by reason of bad hills and swamps, while the new road was good. On the back of the report was endorsed the minute of the Quarter Sessions thereupon, namely: "Read and approved and confirmed this 18th July, 1837," &c., which, with the user of the road as a highway, was the only evidence of their action in the matter. At the time the road was laid out the Quarter Sessions had no power to sell an original road allowance or convey it to the person whose land was taken in compensation; and they could only alter a road on the condition that the new or substituted road should

C. of A.]

NOTES OF CASES.

[C. of A.]

be of not less width than the one for which it was substituted; while in ordering a new road they had a discretion to lay it out of any width between 40 and 60 feet. The original road allowance was 60 feet wide, while the new road was only 40 feet.

*Held*, affirming the judgment of the Common Pleas, that the plaintiff acquired no right to the original allowance under 50 Geo. III., ch. 1, and 4 Geo. IV., ch. 10, nor under the subsequent Municipal Acts.

*S. Richards*, Q.C., for the appellant.

*Bethune*, Q.C., and *J. W. Kerr*, for the respondent.

*Appeal dismissed.*

From Chy.]

[June 25th.]

CAMERON V. KERR.

*Collateral security to bank—Appropriation of payments.*

M. & Co. being desirous of obtaining additional advances from a bank, executed a mortgage to secure a large sum for which they were liable on the 31st December, 1873, on commercial paper of the firm and its customers, which had been discounted by the bank. The mortgage provided that it should continue a security for the said sum and all renewals or substitutions therefor, and all indebtedness of M. & Co., in respect thereof. After the mortgage was given, M. & Co.'s line of discount was increased, but no separate account of the liabilities secured by the mortgage and these further advances was kept, the proceeds of the discounts and cash deposits being carried to M. & Co.'s credit in one open current account, against which they drew cheques to retire the notes secured by the mortgage as they matured. M. & Co. became insolvent on the 12th August, 1875, their indebtedness in the meantime never having been reduced.

*Held*, affirming the judgment of Blake, V.C. that this mode of keeping the accounts had not operated to a discharge of the mortgage debt.

*Robertson*, Q.C., *McMurrieh* and *Symons* for the appellants.

*MacLennan*, Q.C., (*Rae* with him) for the respondent.

*Appeal dismissed.*

From Chy.]

[June 25th.]

OSTROM V. PALMER.

*Estate tail—"Consent" of protector.*

The tenants in tail and the mother who was

protector to the settlement having a life interest in the estate, joined in a mortgage in fee simple, purporting to be made under the Act respecting short forms of mortgages, and containing the usual covenants, for the purpose of securing moneys borrowed for the purpose of paying off legacies charged on the whole estate, including her interest therein.

*Held*, reversing the judgment of Proudfoot, V.C. that her consent sufficiently appeared, and that the estate tail was barred.

*C. Robinson*, Q.C., for the appellant.

*E. Blake*, Q.C., for the respondent.

*Appeal allowed.*

From Q.B.]

[June 25th.]

MECHANICS' BUILDING AND SAVINGS SOCIETY V. THE GORE DISTRICT MUTUAL INSURANCE COMPANY.

*Mutual insurance policy—Assignment to mortgagee—Effect of subsequent insurance by mortgagor.*

*Held*, reversing the judgment of the Queen's Bench, where a mortgagee takes a transfer of a policy, under the latter part of section 39 of 36 Vict., c. 44 O., by way of additional security, the policy continues to be voidable by the acts of the mortgagor.

*Held*, also, that making a mortgage is an alienation within the meaning of section 39; and a mortgagee may avail himself of the power of novation accorded to alienees in general by taking the steps pointed out in the second paragraph of the above section, in which case he acquires a separate independent interest under the policy, and the policy will not be avoided by the acts of the mortgagor.

*Bethune*, Q.C. (*Durand* with him), for the appellant.

*McCarthy*, Q.C., and *Oslor*, Q.C., for the respondent.

*Appeal allowed.*

C. C. York]

[June 25th.]

LAWSON V. LAIDLAW ET UX.

*Married Woman.—Separate Property.*

Declaration on a promissory note made July 2, 1875, by the defendant and his wife, payable to the plaintiff.

Plea by C. A. Laidlaw, that when she made the note she was and still is the wife of the defendant, J. Laidlaw.

Replication that C. A. Laidlaw was and is possessed of separate real estate in this Province

## C. of A.]

## NOTES OF CASES.

## [C. of A.]

in which her husband has no legal or equitable interest, and that she contracted with the plaintiff and made the note in reference to, and to make her separate estate liable to be sold, if not paid at maturity, and that the plaintiff took the note from her relying upon the security of her separate estate to pay for it.

The defendants were married in 1854 without a marriage settlement. In 1852 the plaintiff became entitled as one of her father's heirs at-law to a share in certain real estate. This property was never taken possession of by either of them. It was afterwards sold under a decree for the purpose of making partition and at the time the note was given, Mrs. Laidlaw was entitled to the purchase money which was then in Court. The note was given for groceries supplied to her husband. The plaintiff only consented to let the account run on condition of its being secured by Mrs. Laidlaw—and the husband promised to procure his wife to make the joint note with him—but the husband had no authority to make this agreement, and the plaintiff had no communication with Mrs. Laidlaw. After the account was closed she joined her husband in making the note at his request, intending to pay it out of the money in Court. The evidence showed that the plaintiff supplied the goods on the faith that they would be paid for out of Mrs. Laidlaw's separate estate.

*Held*, affirming the judgment of the County Court, that the plaintiff was entitled to recover as the purchase money was her separate personal property, to which she was entitled when the note was made, and in reference to which she contracted.

*T. Ferguson, Q.C.*, for the appellant.

*C. A. Durand* for the respondent.

*Appeal dismissed.*

C. C. Essex.]

[June 27th.

*Re MORTON, AN INSOLVENT.*

*Insolvency—Accommodation Endorser—Right to Security.*

The insolvent, prior to his insolvency, borrowed \$1,500 from M. & Co. bankers, from whom he was accustomed to obtain accommodation in carrying on his business. He gave them a chattel mortgage as security, and his promissory note at three months which was discounted by them at the Molson's Bank.

No assignment was ever made of the mortgage to the Bank, nor did the Bank deal with M. & Co. in reliance on this security.

When the note became due M. & Co. paid \$600 and renewed for \$900. M. & Co. shortly afterwards went into insolvency and the Bank claimed to be entitled to the \$1,500 chattel mortgage.

*Held*, in the Court below that the Bank were guilty of such laches and negligence in not realizing upon the mortgage as disentitled them to assert their right to the mortgage.

*Held*, in the Court of Appeal, affirming the judgment of the County Court, that under the circumstances the Bank could not be held guilty of laches as they never held the mortgage, and that if the transaction had remained as it was originally the Bank would have been entitled to the security; but a payment of \$600 having been made the Bank was not entitled to claim priority in respect of that amount.

*Osler*, for the appellant.

*H. J. Scott*, for the respondent.

*Appeal dismissed without costs.*

C.C. Leeds and Grenville.]

[June 27th.

*Re COULTON—AN INSOLVENT.*

*Costs—Privileged claim.*

Under a decree, the Master found the amount due for debt and costs from C. to G., and G. issued execution for the costs. Shortly afterwards, and before the report was confirmed, C. became insolvent, whereupon the suit was revived, and the report was appealed from, when it was referred back to the Master; but the *fi. fa.* was ordered to stand for the amount to which the costs might be reduced upon taxation. The costs were largely reduced.

*Held*, affirming the judgment of the County Court, that, under sub-section K of section 3 of the Insolvent Act of 1875, the plaintiffs were entitled to a preferential lien in respect of the costs covered by the execution.

*W. Cassels*, for the appellant.

*Bethune, Q.C.*, for the respondent.

*Appeal dismissed.*

C.C. York.]

[June 28.

*Re CLEVERDON V. MARTIN, INSOLVENTS.*

*Insolvent Act of 1875—Priority of claims.*

The Insolvent and one Coombe, who were partners, made an assignment in Insolvency to



## Q. B.]

## NOTES OF CASES.

[Q. B.]

1876. A majority of the creditors, in value and number, including the wife and daughter of the insolvent, who were claimants, executed a deed of composition and discharge in consideration of a payment by him of 65 cents in the dollar. The wife and daughter consented to postpone their claim to the composition until the other creditors were paid. The insolvent then formed a partnership with one M., and it was arranged between them that the amount of these claims should remain in the business for the uses of the firm, and that they should receive interest thereon. The new firm also went into insolvency before the composition was paid, whereupon the wife and daughter claimed to rank on the estate with the other creditors.

*Held*, affirming the judgment of the County Court, that the assets of the old firm, which by the deed of composition and discharge were assigned to the insolvent, having been transferred to the new firm for what must be assumed was a valuable consideration, the claimants could not be postponed to the creditors of the old firm.

*Kerr*, Q.C. (*W. R. Mulock* with him) for the appellants.

*M. C. Cameron*, Q.C., for the respondent.

*Appeal dismissed.*

From C. P.]

[June 25th.

**MERCHANTS' BANK V. BOSTWICK.**

The judgment of the Common Pleas, reported 28 C. P. 450, was affirmed.

*S. Richards*, Q.C., and *Bethune*, Q.C., for the appellants.

*Robinson*, Q.C., for the respondent.

*Appeal dismissed.*

**QUEEN'S BENCH.**

**IN BANCO—EASTER TERM.**

**WESLOH V. BROWN.**

*Promissory Note—Indorse—Alteration without notice—Promise to pay.*

After making of a promissory note, it was altered by the maker, as to the time of payment, without the consent of the indorser, who, however, but without knowledge of the alter-

ation, promised to pay it: *Held*, in an action against the indorser, that the alteration having been made without his authority, rendered the note void, and that no subsequent promise by him to pay could have the effect of ratifying it.

*Held*, also, that without actual knowledge, the promise to pay amounted to nothing, the means of knowledge alone being insufficient.

*Richards*, Q. C., for plaintiff.

*F. Osler* for defendant.

*Rule absolute to enter nonsuit.*

**BLACK V. REYNOLDS.**

*Interpleader—Delay in giving security—Neglect of Sheriff to appraise—Effect of—Sale of goods by Sheriff—Action against—Estoppel.*

In trover for the value of a piano, sold by the defendant, as Sheriff, under an execution, it appeared that an interpleader had been directed as to the piano, the plaintiff to give the usual security within 20 days. The defendant, though applied to, neglected to appraise the value of the piano, until impossible for the plaintiff to give the required security. Security was, however, afterwards given, but the defendant, notwithstanding, sold the piano, contending that he was justified in so doing, as the plaintiff had not complied with the terms of the order.

*Held*, that plaintiff having been prevented by the defendant's neglect from complying with the order, defendant was estopped from saying that plaintiff's non-compliance therewith justified him in selling the piano.

*Held*, also, that the effect of defendant's neglect was either to deprive him of the protection of the order or to operate as a waiver of the time thereby limited for giving security.

*H. Cameron*, Q. C., for plaintiff.

*F. Osler* for defendant.

*Rule absolute to enter verdict for plaintiff for \$450.*

**BROWN V. MORROW.**

*Will—Search—Memorial by heir-at-law—Declaration against interest—Evidence.*

A witness swore that she had seen the will, giving an explicit statement of its contents; and it further appeared that the devisees, among them the heir-at-law, all submitted to and acted upon it:

*Held*, sufficient evidence of the existence of the will.

*Held*, also, that the heir-at-law's execution

Q. B.]

NOTES OF CASES.

[Q. B.]

and registration of a memorial of the will were satisfactory proof of the latter, as being a declaration against his proprietary interest, he being dead at the time of the trial.

*Ferguson, Q. C., for plaintiff.*

*McCarthy, Q. C., for defendant.*

*Rule discharged.*

REGINA V. SMITH.

*Forcible entry—Restitution.*

Defendants, employees of the Great Western Railway Co.,—in obedience to orders from the Company went upon the land in question, then in possession of the Stratford & Hamilton Railway Co., and occupied by its employees. No actual force was used, but the latter had good reason to apprehend that sufficient force would be used to compel them to leave, and they left accordingly.

*Held*, that this was a forcible entry within the statute relating thereto.

The judge at the trial having granted a writ of restitution, *Held*, that such writ is in the discretion of the presiding judge, and that it had been properly exercised here.

*M. C. Cameron, Q. C., for defendant.*

*Smith for the Crown.*

*Conviction confirmed.*

PRINGLE V. CORPORATION OF THE TOWN OF NAPANEE.

*Christianity part of the law of Ontario.*

*Held*, that Christianity is part of the recognised law of this Province, and therefore that to an action for breach of contract to let a public hall, a plea setting up that the purpose for which said hall was intended to be used was for the delivery of certain lectures containing an attack upon Christianity was a good defence, and plaintiff was not entitled to recover.

*Bethune, Q. C., for plaintiff.*

*Reeve for defendants.*

*Rule discharged.*

LUCAS V. MOORE.

*Highway—Want of repair—Death resulting from contributory negligence—Evidence.*

Plaintiff's husband was found dead in a ditch along defendant's highway, the hub of his waggon-wheel resting upon him, the waggon being in a dilapidated condition, and he fastened down very tightly. One of his horses was dead. The ditch was about 12 feet deep and 32 feet wide, much wider at the top than

at the bottom, and extending about half way into the travelled road, which it appeared had been in this condition for several years. There was no railing or other guard round the ditch, nothing to indicate its situation on a dark night, such as the night in question was. It appeared that deceased was under the influence of liquor, though there was contradictory evidence on this point; but there was no distinct evidence as to how he fell into the ditch. *Held*, that there was evidence for the jury of non-repair of the road within the meaning of the present Municipal Act, and that such non-repair was the cause of the death; and that assuming there was a breach of duty on defendant's part, deceased having been lawfully using the highway, it might be fairly inferred that but for such breach of duty the accident would not have occurred.

The question of contributory negligence having been left to the jury and found in plaintiff's favour, the Court refused to disturb the verdict.

*F. Osler for plaintiff.*

*Robinson, Q. C., and Ferguson, Q. C., for defendant.*

*Rule discharged.*

DILLARCE V. DOYLE.

*Gratuitous loan—Increase.*

In the case of a gratuitous loan all the increase of and offspring of the loan, and everything accessional to it belong to the lender, and must be returned at the determination of the loan, and are not subject to seizure under execution against the bailee.

*Spencer for plaintiff.*

*Campbell for defendant.*

*Rule absolute to increase verdict by \$208.*

MCARTHUR V. EAGLESON.

*Ejectment—Estoppel en pais—Statute of Limitations.*

Plaintiff, intending to return after a short interval, left his wife and home more than 30 years ago, and went to the United States, where he remained until a short time before this action. He had never communicated with his wife or friends whilst absent, and was until his return, two or three years ago, believed to be dead. Several years since, and within seven years after his departure, his wife, acting on this belief, married again, and lived with her new husband on plaintiff's farm. They both

Q. B.]

NOTES OF CASES.

[Q. B.]

mortgaged the farm to a Building Society, which sold it under a power of sale in the mortgage. On his return plaintiff brought ejectment against the purchaser from the company. *Held*, that he was entitled to recover, and that however culpable he may have been in not communicating with his wife, his negligence did not, even as against a purchaser under the *bond fide* belief that he was dead, stop him from claiming the land. *Held*, also, Wilson, J., dissenting, that he was not barred by the Statute of Limitations, for the possession of his wife was his possession.

*Rock, Q.C., and Ferguson, Q.C., for plaintiff.*  
*Robinson, Q.C., for defendant.*

*Rule discharged.*

#### PARSON V. CITIZEN'S INS. CO.

*Fire Insurance—39 Vict. Ch. 24—Absence of conditions—Averment of in declaration—Estoppel—Excessive statement of loss—Prior insurance—Excessive valuation.*

A policy of Insurance issued after 39 Vict. ch. 24, did not contain conditions made necessary by that Statute.

*Held*, that the declaration having stated the policy was subject to conditions, setting them out, did not estop plaintiff from contending that there were no conditions, for he could amend if he saw fit.

Plaintiff having stated his loss at a much larger figure than the jury found he had sustained, the Court nevertheless refused to interfere on this ground, as the jury had at the same time found that he acted honestly, in making the representation.

The omission to communicate an existing insurance with another Co. is not *per se* such a wrongful concealment as to sustain a plea of fraud.

Excessive valuation does not avoid a policy unless intentional.

*M. C. Cameron, Q. C., for plaintiff.*

*F. Osler and M. McCarthy, for defendants.*

*Rule discharged.*

#### PARSONS V. QUEEN'S INS. CO.

*Fire insurance—Interim receipts—Prior assurance—Notice of.*

In an action on an interim receipt for insurance against fire, it appeared that annexed to the application and delivered to the Company, at the same time was a memorandum of prior assurances.

*Held*, that the memo. was part of the application, conveying full and correct information of the prior assurances, and the agent having received it, accepted the premium and issued the interim receipt, must, so far as the latter and the right of the plaintiff thereunder were concerned, be held to be the act and assent of the defendants, and therefore that, treating the interim receipt as subject to the Statutory conditions, the 8th condition as to the assent of the Company appearing in or being endorsed on the policy, had been sufficiently complied with.

*Held*, also, that "as soon after as practicable" in the 13th condition means within a reasonable time.

*F. Osler and M. McCarthy for plaintiff.*

*M. C. Cameron, Q.C., and J. T. Small for defendants.*

*Rule discharged.*

#### FRAZER V. McFARLANE.

*Promissory note—Married woman—Separate liability as indorser.*

A married woman, possessed of separate estate acquired by her after the Married Woman's Act of 1874, indorsed a note for the accommodation of her husband, member of a firm to whom credit was given on the faith of such separate estate and her indorsement in reference thereto.

*Held*, that she was liable.

*McLaren for plaintiff.*

*J. A. Miller for defendant.*

*Rule discharged.*

#### HERBERT V. MERCANTILE INS. CO.

*Fire insurance—Misrepresentation—Warranty—Adverse witness—Discretions of Judge at trial—Right to review.*

To a question asked plaintiff, on his application for insurance, whether there was any incendiary danger either threatened or apprehended, the answer was in the negative, but the evidence shewed the contrary in both respects. The contract of insurance made the answer a warranty.

*Held*, that he could not recover.

The Court will not review the discretion of the Judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse; nor in receiving evidence on the part of the defence after the close of the plaintiff's case, even though for the purpose of corroborating the defence.

Q. B.]

NOTES OF CASES.

[Q. B.]

*F. Osler*, for plaintiff.*J. K. Kerr*, for defendants.*Rule discharged.*

## O'DONOHUE V. WILEY.

*Foreign contract—Breach out of jurisdiction.*

Defendants, merchants in New York, telegraphed plaintiff, an attorney practising in Toronto, in answer to a telegram from him offering his services, to represent them in certain insolvency proceedings pending in the latter place. Plaintiff did so, and upon sending his bill for services, which he did by letter, addressed to defendants at New York, defendants, by letter from New York, addressed to plaintiff at Toronto, refused payment. *Held*, that plaintiff could not recover, as both contract and breach arose out of the jurisdiction.

*Held*, also, that the words "cause of action" (Rev. St. O. ch. 50, sec. 49), do not mean the whole cause of action—i.e., breach and contract, but breach alone.

*Ferguson*, Q.C., for plaintiff.*Foster*, for defendants.*Rule discharged.*

## WILSON V. RICHARDSON.

*Reference by consent—Time for moving against.*

An award made under sec. 160, Con. Stat. U.C. ch. 22, before Trin. Term, must be moved against within the first four days of that Term, even though the full Court may not sit, as the motion can be made to a single Judge within the same period.

The order of reference, made at Nisi Prius, was afterwards made a rule of Court by the defendant, and expressed to be by consent of all parties: *Held*, not a compulsory reference under sec. 165 of the above Act, but a reference under sec. 160.

*Robertson*, Q.C., for plaintiff.*Osler*, Q.C., for defendant.*Rule discharged, with costs.*

## GOWANS V. CONSOLIDATED BANK.

*Sale of goods—Insufficient delivery—Warehouse receipts.*

Plaintiffs contracted for the manufacture of a quantity of glassware, which though invoiced to and paid for by plaintiffs, was stored with a warehouseman as the goods of the manufacturers, and warehouse receipts granted to the latter, by whom they were transferred to defendants as collateral security for ad-

vances made to them. *Held*, that there had not been a sufficient delivery of the goods to pass the property in them to the plaintiffs, and that the defendants were therefore entitled to recover.

*F. Osler* for plaintiff.*R. Martin*, Q.C., for defendants.*Rule discharged.*

## IN RE MAYLE AND THE CITY OF KINGSTON.

*Award—Rev. Stat. O. ch. 134, sec. 456—Delay in moving against.*

*Held*, that an application to set aside an award made under Sec. 456, Rev. Stat. O., ch. 134 and published before Trinity Term 1877, was too late on the 26 Nov. following.

*MacLennan*, Q. C., for the City of Kingston.*G. Kirkpatrick* contra.*Rule discharged without costs, no costs of rehearing.*

## BROWN V. WINNING.

*Married women—Sale of goods to—Separate estate—Examination in another suit—Admissibility in evidence.*

Defendant, a married woman, possessed of real estate in Ontario, but living with her husband in Montreal, purchased goods from plaintiffs there, for domestic purposes. There was no evidence either of a settlement making the real estate separate estate, or that the marriage took place after the 2nd March, 1872; nor was it shewn that the debt was contracted with reference to her separate estate.

*Held*, that defendant was not liable to be sued for the price of the goods.

The only evidence of defendant's ownership of real estate was her admission signed by her when under examination in another suit.

*Held*, clearly admissible.*Richards*, Q. C., for plaintiffs.*F. Osler* for defendant.*Rule discharged.*

## CRAIN V. TRUSTEES OF COLLEGIATE INSTITUTE OF OTTAWA.

*Award—Appeal under 39 Vict. ch. 28, sec. 7, O.—Rev. Stat. O., ch. 50, sec. 192—41 Vict. ch. 6, sec. 3, O.*

*Held*, that notwithstanding sec. 3 of ch. 6, 41 Vict. O., sec. 192 of ch. 50, Rev. Stat. O. being not only in effect, but in words the same as sec. 7 of 39 Vict. ch. 28, O. repealed but re-enacted by it, must receive the same construction as the repealed enactment under the

Q. B.]

NOTES OF CASES.

C. P.

*Manufacturers' and Merchants' Fire Ins. Co. v. Alwood.* 28 C. P. 21; and therefore that there can be no rehearing by the Court by way of appeal from the decision on an award made by a single Judge under the repealed enactment.

*Cassels* for plaintiff.

*F. Osler* for defendants.

*Rule discharged.*

MCEDWARDS V. MCLEAN.

*Replevin—Distress for rent—Official Assignee—Pleading.*

*Held.* 1. That a plea denying right of plaintiff to goods did not put in issue the fact that plaintiff was Assignee.

2. That the Insolvent Act does not take away right to distrain.

*F. Osler* for plaintiff.

*Davidson* for defendant.

*Rule absolute, to reduce verdict to \$164.25.*

ONTARIO BANK V. WILCOX.

*Chattel mortgage—Assignee in insolvency—Notes improperly stamped—Execution—Attachment.*

*Held* (1), That chattel mortgage securing mortgagee against endorsements must shew on its face that the indorsed notes, or renewals, fall due within a year, in order to save mortgages as against creditors or purchasers, but not assignee in insolvency.

(2), Notes improperly stamped are invalid if holder does not attach double stamps and cancel same when first receiving same, and will not support chattel mortgage.

(3), A chattel mortgage valid between the parties at common law, is valid against assignee in insolvency.

(4), An execution against insolvent debtor is superseded by attachment in insolvency, and chattel mortgage void against execution creditor, but good against assignee, prevails over execution so superseded.

*M. C. Cameron, Q.C.,* for plaintiffs.

*H. Cameron, Q.C.,* for defendant.

*Rule discharged.*

## COMMON PLEAS.

IN BANCO—EASTER TERM.

JUNE 28, 1878.

LEYS V. HOLLINSHEAD.

*Mortgage—Delivery—Evidence.*

In an action on the covenant in a mortgage to pay the purchase money, the defendant set up that the mortgage had been delivered over by his solicitors to the plaintiff without his authority.

*Held*, that the evidence set out in the case showed that the plaintiff was cognizant of his solicitors' dealings in the matter, and had authorized the delivery to the plaintiff when the solicitors' in the defendant's interest, should deem it advisable, and it appeared that, on the faith of the solicitors' acts, the position of the parties was changed. The plaintiff was therefore held entitled to recover.

*Robinson, Q. C.,* for the plaintiff.

*J. B. Clarke* for the defendant.

RIDGWAY V. THE CORPORATION OF TORONTO.

*Municipal Corporations—Accident—Liability.*

The Water Commissioners of the City of Toronto, in order to drain off an old reservoir belonging to the city, but not in use for water works purposes, and in no way connected with the water-works they were constructing, dug a drain along a street in the city, but so negligently that it caved in, whereby the plaintiff was injured. The plaintiff having sued the defendants for the injury he had sustained,

*Held*, that the defendants were liable.

DENHAM V. BREWSTER.

*Promissory Notes—Action by wife's administrator—Consideration—Stamps.*

Action by plaintiff as administratrix of Mrs. T., widow of R. T., deceased, against defendants, his administrators, on two promissory notes, alleged to have been made by R. T. to Mrs. T., his wife, one bearing date April 2nd, 1869, for \$125; and the other bearing date April 3rd, 1871, for \$900; both payable one year after date.

*Held*, that the plaintiff could not recover: that there was no evidence that the wife ever gave any value for the notes, or that she ever

C. P.]

NOTES OF CASES.

[C. P.]

was possessed of or claimed any interest in them during his lifetime, or that they came into the plaintiff's possession in such a manner as to raise any presumption of liability against the husband's estate.

*Held*, also, that the notes were invalid as they appeared to be insufficiently stamped.

*Ogden* for the plaintiff.

*Robinson, Q. C.*, for the defendants.

#### PARKINSON V. CLENDINNING.

*Action for unpaid purchase money—Acknowledgment of payment in deed and receipt therein—Equitable right to recover—Agreement—Evidence.*

In an action against defendant for unpaid purchase money on the sale of land, the deed thereof acknowledged the purchase money to have been paid, as also did the receipt on the deed, but the defendant in an equitable defence set up by him admitted the money was not paid, but claimed that he was not liable to pay it, by reason of the breach of an agreement made by the plaintiff at the time of the conveyance to pay off a prior conveyance, and on the faith of which agreement the defendant purchased. In his evidence at the trial he made the same admission.

*Held*, that the Court could entertain the plaintiff's claim as an equitable demand, under the Administration of Justice Act; but that the evidence failed to establish the agreement relied on.

*Spencer* for the plaintiff.

*Beatty, Q. C.*, for the defendant.

#### LAW V. HAND-IN-HAND MUTUAL INSURANCE COMPANY.

*Insurance—Subsequent erection of steam engine—Waiver—Evidence.*

In an action against defendants, a mutual insurance company, on a policy against fire, averring a total loss, the defendants set up that the risk had been increased by the erection on the premises of a steam engine, whereby the policy was avoided. It appeared that when the engine was erected the plaintiff notified the defendants thereof, and they informed him that he must pay an increased premium, which he refused to do, as he said it was too high: that nothing further was done and no further objection was made until a month after the fire occurred: that when by the terms of the policy the renewal premium became due, the plaintiff received notice thereof

from the agent to whom the renewal receipt had been sent from the head office, requiring him to pay the same, which he did, and was given the renewal receipt, and there was the same notice and payment of the next renewal premium.

*Held*, that under these circumstances the company could not set up that the policy had been avoided.

*Richards, Q. C.*, for the plaintiff.

*Maclean, Q. C.*, for the defendants.

#### THE CONSOLIDATED BANK V. CAMERON.

*Sci. fa.—Assets quando acciderint—Lands.*

A *sci. fa.* upon a judgment *assets quando acciderint* must only pray execution of such assets as have come to the defendant's hands since the recovery of judgment, and if it pray execution generally it cannot be supported.

In an action of *sci. fa.* on a judgment against defendant as executrix under the will of C. deceased, it was alleged that divers lands as well as goods and chattels had come to the defendant's hands as such executrix to be administered, and praying execution.

*Held*, that the lands of which the testator died seized did not become assets in the hands of the executrix to be administered, and there being no evidence of any goods and chattels having come to the executrix's hands to be administered since the recovery of the judgment, a verdict was entered for the defendant. The Court intimated that the plaintiffs could obtain execution against the lands in the ordinary way.

*J. K. Kerr, Q. C.*, for the plaintiff.

*Oslor*, for the defendant.

#### LOUCKS V. MCSLOY.

*Chattel mortgage—Verbal consent to sale—Estoppel—Damages.*

A chattel mortgage contained a proviso that in case the mortgagor should attempt to sell, &c., the mortgaged goods or any of them, without the mortgagee's consent in writing, then the mortgagee might enter and take the goods. The mortgagor sold a pair of horses, part of the mortgaged goods, to the plaintiff, when the defendant, the mortgagee, entered and took them, and kept them some four days, when he returned them to the plaintiff, who was not subsequently disturbed in his possession. The plaintiff having sued the defendant for the taking:

C. P.]

NOTES OF CASES.

[C. P.]

*Held*, that the evidence as set out in the case shewed that the defendant either verbally consented to the sale or acted in such a manner as would estop him from setting up the proviso and denying the property passing to the plaintiff.

*Bunker v. Emmany*, 28 C.P. 438, distinguished.

*Held*, also, that under the circumstances of the case, the plaintiff could only recover damages for the four days' detention, and not for the value of the horses in addition.

*Read*, Q.C., for the plaintiff.

*Robertson*, Q.C., for the defendant.

#### SLY V. OTTAWA AGRICULTURAL INSURANCE COMPANY.

*Insurance—Variations of conditions not complying with statute—Value and age of building—Arbitration.*

Action on a policy of insurance for \$600 on a wooden building, alleging a total loss by fire. The policy contained the statutable conditions, and also what purported to be variations thereof, but without the statutory headings, by which the insured was stated to warrant the truth of the representations as to the value and age of the building, but all the conditions and variations were set out in the declaration. The plaintiff, in his application and proof papers, stated that the building was worth \$900 and to be ten years old, while the jury found its value to be \$300 and its age 19 years; but that plaintiff's statements as to value were not wilfully made. The defendants set up the breach of warranty, and also fraudulent misrepresentation, as to the value and age of the building. They also set up that by one of the conditions the value must be ascertained by arbitration.

The Court were dissatisfied with the finding of the jury as to the plaintiff's statement as to value not being wilfully made, but refused to give effect to the variations of the conditions, as not complying with the statute, and that even if sufficient whether they were not unreasonable, and that, even though their appearance on the record was the plaintiff's own fault, they would not deprive him of his objection to them, taken at nisi prius, and afterwards insisted upon in term.

The Court, under the circumstances, set the verdict aside: that, if defendants desired to try the question of fraudulent over-valuation, they might have a new trial without costs;

but if they only desired to try the question of value, then there was to be an order of reference as required by the conditions.

*Smythe* (of Kingston) for the plaintiff.

*J. K. Kerr*, Q.C., for the defendants.

#### MORRIS V. HOYLE.

*Master and servant—Will—Wages.*

The plaintiff when an infant a few months old was taken by the defendant, his uncle, a farmer, who had no children of his own, to live on the farm, and he continued to live thereon until just before the commencement of this action, when he was 26 years old, having, but without any contract of hiring, always worked on the farm. When the plaintiff was 16 years old, the defendant led him to understand that he would leave him the farm by his will, and he subsequently made a will in plaintiff's favour. Afterwards they quarrelled, and defendant tore up the will and turned the plaintiff off the farm. The plaintiff then brought this action to recover the value of his services, during the three years after his attaining his majority, it appearing that he and defendant had during the last three years worked the farm on shares, and that during such period no claim was ever made for his services for the three years now sued for.

*Held*, that the relationship of master and servant never existed between the parties so as to entitle him to recover the value of his services during the period claimed for.

*Oslar*, for the plaintiff.

*Robinson*, Q.C., for the defendant.

#### THE STADAONA INSURANCE COMPANY V. MCKENZIE.

*Calls on stock—Computation of time.*

Where calls on stock were to be made "at periods of not less than three months' interval," and one call was made payable on the 10th of August, and another on the 10th November.

*Held*, by the Court of Common Pleas, affirming the judgment of Galt, J., that the interval of three months had not elapsed between the two calls and that the second call was therefore bad.

*H. J. Scott* for the plaintiff.

*J. Crerar* for the defendant.

#### PARSONS V. VICTORIA MUTUAL INSURANCE COMPANY.

*Insurance—Further insurance—Setting up—Estoppel.*

The plaintiff had been insured on his stock

in the defendants' company in \$2,000, and in other companies with defendants' consent in \$3,000, making in all \$10,000. In July he wrote defendants, notifying them of certain changes he had made in his policies, giving the amounts and companies, the total not exceeding \$10,000. The defendants replied that notice of such changes was not necessary when the total amount was not increased. After plaintiff's letter of July, defendants reduced the plaintiff's policies to \$1,000, and returned him the unearned premium on the other \$1,000. The plaintiff, without notifying defendants, procured an insurance for a \$1,000 in the Quebec Insurance Company, and there were changes in some of his other policies, but at no time, and up to the fire, did the total amount exceed \$10,000.

*Held*, that the defendants could not set up that there was a further insurance without the consent of the defendants in writing as required by one of the conditions of the policy.

*Oster and M. McCarthy*, for the plaintiff.

*M. C. Cameron, Q.C.*, for the defendants.

#### THISTLE V. UNION FORWARDING COMPANY.

*Lease—Covenants to repair—Continuing breach—Tempest.*

A lease, dated 7th May, 1874, for eight years, was made by the Pembroke Pier and Dock Company of their wharf or pier, to the defendants, containing a general covenant to repair, reasonable wear and tear, and accidents by fire and tempest excepted, and also a covenant to repair after a month's notice in writing, but without the above exceptions. In May, 1876, the pier was damaged by the action of the ice forced against it by reason of a high wind. On 11th February the lease was sold to the plaintiff under an execution against the lessors, and on the 10th July a deed thereof was executed by the sheriff. On 24th November 1876, a written notice to repair was given by the plaintiffs to the defendants. In an action against defendants for the breach of the covenants to repair generally, and after notice, the damage caused by the ice as aforesaid,

*Held*, that such non-repair was a continuing breach of the covenants to repair of which the plaintiff might avail himself.

*Held*, also that the covenant to repair after notice was subject to the same exceptions as contained in the general covenant.

*Held*, also that the damage here sustained,

could not be said to be caused by tempest, so as to bring it within the exception.

*Robinson, Q.C.*, for the plaintiff.

*J. K. Kerr, Q.C.*, for the defendants.

#### FITZGERALD V. GRAND TRUNK RY. CO.

*Conditions—Additional parol term—Carriage of oil in covered cars—Station Freight Agent.*

On the new trial in this case, (see 27 C. P. 528,) the Court was of opinion that a parol contract to carry in covered cars was clearly proved, and that it qualified the written contract to that extent; and that there was no such person as defendants' "station freight agent," at Halifax, to whom plaintiff could give notice as required by the condition in that behalf.

*Glass, Q.C.*, and *Fitzgerald* (London), for the plaintiff.

*M. C. Cameron, Q.C.* for the defendants.

#### YOUNG V. SMITH.

*Landlord and tenant—Proviso for rent becoming in arrear on commencing to remove goods—Distress—Legality.*

By the terms of a lease it was provided that in the event of the tenant commencing to remove the goods from the demised premises, the then current year's rent should immediately become due and in arrear. The tenant commenced removing the goods with a view of quitting the premises, when the landlord entered and distrained.

*Held*, That the distress was legal.

*Griffith v. Brown*, 21 C.P. 12, and *Re Hoskins*, 1 App. 379, distinguished, as being between the landlord and persons claiming under the insolvency, whereas in this case, it was a matter directly between the landlord and tenant, the parties to the contract.

*Duff* for the plaintiff.

*Oster, Q.C.*, for the defendant.

#### NEWMAN V. GINTY.

#### DENISON V. GINTY.

*Ry. Co.—Action by creditor against shareholders—Proof of defendant being a shareholder.*

In an action against defendant as a shareholder of forty shares for unpaid stock, it appeared that the defendant signed the stock-book, which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of any or our said respective shares,"



## C. P.]

## NOTES OF CASES.

## [C. P.]

they covenanted to pay the company ten per cent. of the amount of said shares and all future calls. The company subsequently passed a resolution instructing the secretary to issue allotment certificates to each shareholder for the shares held by him. The secretary accordingly prepared such certificates, the one for the defendant representing that the company "in accordance with your application for forty shares," &c., "have allotted to you shares amounting to \$4,000." The certificates were handed to the company's brokers to deliver to the shareholders. It appeared that the company published a notice in a daily paper, that these certificates were lying at their brokers, who were authorized to receive the ten per cent.: that the defendant went to the brokers and paid them ten per cent. upon the forty shares; and his name was thereupon entered in the books of the company as the owner of forty shares with a credit of ten per cent. as paid thereon; and that he attended the first meeting of shareholders for the election of directors and moved a resolution for the payment of the provisional directors for their services.

*Held*, That the defendant was a shareholder.

The defendant also set up a verbal agreement made before subscription with one of the provisional directors of the company that he was not to be a shareholder unless he were awarded a contract by the company.

*Held*, that no effect could be given to this.

*Richards*, Q.C., and *T. S. Kennedy* for the plaintiff.

*Ferguson*, Q.C., for the defendant.

## NASMITH V. GINTY.

This was a similar action to the above in which there was the same judgment.

*Richards*, Q.C., and *Proctor* for plaintiff.

*Ferguson*, Q.C. for the defendant.

## NASMITH V. MANNING.

This case differed from the above cases, in this that the defendant never paid the ten per cent., and never called for or received the certificate of allotment of fifty shares for which he subscribed, and he stated that he never had any notice of the allotment having been made to him.

The Court granted a new trial so as to have it expressly found on a fact whether the

defendant had received any sufficient notice of the company having accepted him as a shareholder according to his subscription.

*Richards*, Q.C., and *Proctor* for the plaintiff  
*Ferguson*, Q.C., for the defendant.

## WILKINSON V. LAWSON.

*Wages—Action for.*

In 1863, the plaintiff, whose husband had left her, was hired by the defendant as his housekeeper at \$10 a month. He gave her \$30 a month for the household expenses, &c., but never paid her anything as wages. In 1875, the plaintiff, who for some time previous had cohabited with defendant, went through the form of marriage with him, and lived with him until 1877, having the full benefit of his earnings and position as his wife, when they quarrelled and separated. It appeared that the husband was alive, of which the defendant was ignorant, and of which the wife stated she also was; but it appeared that she might have ascertained the truth if she had so desired. The plaintiff having sued defendant for wages during the six years previous to the commencement of the action,

*Held*, that she could not recover.

*Davidson Black*, for the plaintiff.

*J. A. Miller* (St. Catharines), for the defendant.

## CAMPBELL V. SPURGEON.

*Action on covenant to pay mortgage money—Equitable defence—Deeds, construction of.*

In an action by the plaintiff as assignee of the covenant contained in a certain mortgage to pay the mortgage money, the defendant pleaded on equitable grounds certain facts to show that the plaintiff was not entitled to maintain the action. The question turned upon the proper construction to be placed upon certain deeds proved and admitted at the trial on which plaintiff's right was based.

*Held*, that the equitable defence was proved, and a verdict was entered for the defendant.

*T. S. Kennedy*, for the plaintiff.

*J. E. Roe*, for the defendant.

## FLOTSAM AND JETSAM.

## FLOTSAM AND JETSAM.

THE *London Standard* thus speaks of the bar in Russia: The bar is to this day far behind in its standard of professional honour and dignity. A system obtains of bargaining direct with the client on the "payment by results" principle. In criminal cases the prisoner will agree to pay his counsel three or four times as much if he secures him an acquittal, and the counsel takes good care to get a large part of this money in advance. A barrister will even descend to frightening his client by exaggerated statements of the danger he is in; and, further, will not scruple to demand, also in advance, payments for "secret purposes"—that is, for bribing influential officials. Indeed, the bar in Russia is mercenary and rapacious; and, as the division of duties recognised in England between the solicitor and the barrister is not known in Russia, sharp counsel are brought face to face with their unhappy clients, and take the measure of their means and ignorant credulity. The barrister regulates his fees in much the same way as an advertising quack doctor would do, and carries on the action or cure in the lowest commercial spirit.

The February number of the *New Zealand Jurist* contains a report of a committal to jail for one month of a barrister practising before the Supreme Court, for contempt of that tribunal. The counsel had objected to the statement of the case made by one of the judges in delivering the judgment of the court. The following conversation ensued: The Chief Justice—It is absolutely impossible to go on with these interruptions. I will not sit here with your interrupting the proceedings, Mr. Barton. Mr. Barton—If your Honour makes decisions which are based upon data contrary to the facts proved in evidence at the trial, I must be allowed to correct the mistakes of the court as to those data. Your decisions should be intelligible to the parties and public, but especially to the parties. The Chief Justice—You must keep your seat and hold your tongue. Mr. Barton—I will assert my right

and my client's right, so long as I am in court. The Chief Justice—I will tell you now to keep your seat and hold your tongue—that is the order of the court. After a few more words the court closed the discussion rather abruptly with another order, this time to the jailor, to hold the barrister for one month in his keeping "without special instructions as to diet or otherwise."

The life of an eminent New York lawyer, Charles O'Connor, shows what diligence and perseverance will accomplish. When eight years old, he was an office boy and a newspaper carrier. His father published a weekly newspaper, and Charles, besides attending in the office, delivered the journal to its subscribers in New York, Brooklyn, and Jersey City. He used a skiff to cross the river, and frequently would be out all Saturday night serving his route. It is said that he never missed a subscriber. When seven years old, he entered a lawyer's office as an errand boy. He borrowed law books, took them home, and read them by the light of a candle, far into the night. Several lawyers, noticing the boy's industry, aided him in his studies. When he was twenty-four years old, he was admitted to the Bar; and even then it was said that young O'Connor's legal opinion was worth more than that of many other lawyers. But success comes slowly to a young lawyer, and it was not until his thirtieth year that clients recognized the legal learning and skill of young O'Connor. He was very poor, but industry and ability were his capital. He worked hard at the smallest case, never slighting any trust, and in time secured the reputation of a man who would do his best for those employing him. To this conscientiousness and industry he owed his success.—*Ex.*

CAPITAL PUNISHMENT IN FRANCE.—A bill for the abolition of punishment by death has been laid upon the table of the French Chamber. The proposition bears the signature of Louis Blanc and of 68 other members of the Extreme Left.—*Ex.*



## Law Society of Upper Canada.

OSGOODE HALL,

HILARY TERM, 41st VICTORIA.

During this Term, the following gentlemen were called to the Bar, viz.:-

GEORGE FERGUSSON SHEPLEY.  
WILLIAM JAMES CLARKE.  
WILLIAM EGBERTON HODGINS.  
JAY KETCHUM.  
ROBERT SHAW.  
HAMILTON PARKE O'CONNOR.  
WILLIAM CAVEN MOSCRIP.  
JAMES JOSEPH ROBERTSON.

The following gentlemen were called to the Bar under 39 Vict. chap. 31.:-

DANIEL O'CONNOR.  
JOSEPH BAWDEN.

The following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:-

### *Graduates.*

ALEXANDER DAWSON, B.A.  
THOMAS DICKIE CUMBERLAND, B.A.,  
WILLIAM BANFIELD CARROLL, B.A.

### *Matriculants.*

FRANCIS BADGELEY WILLIAM MOLSON GILBERT LILLY.

JOSEPH MARTIN.  
J. A. C. REYNOLDS.

### *Junior Class.*

HUGH ARCHIBALD MACLEAN.  
WILLIAM BURGESS.  
LOUIS F. HEYD.  
JAMES FOSTER CANNIFF.  
JOHN DOUGLAS GANSEY.  
GEORGE CORRY.  
EDMUND WALLACE NUGENT.

CHARLES PATRICK WILSON.  
DAVID MCARDLE.  
THOMAS HISLOP.  
WILLIAM ALEX. MCLEAN.  
ALEXANDER JOSEPH WILLIAMS.  
JAMES JOSEPH PANTON.  
WILLIAM MELVILLE SHOEBOOTHAM.  
JAMES GAMBLE WALLACE.  
GEORGE MOREHEAD.  
WILLIAM GEORGE SHAW.  
ROBERT PATTERSON.  
HARRY HYNDMAN ROBERTSON.  
JAMES ALEX. SHETTLÉ.  
MOSES McFADDEN.  
ARTHUR B. FORD.  
GEORGE HIRAM CAPRON BROOKER.

### *Articled Clerk.*

HENRY WHITE.

## PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:-

### CLASSICS.

Xenophon, Anabasis, B. I.; Homer, Iliad, B. I.; Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

### MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I, II., III.

### ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## LAW SOCIETY, HILARY TERM.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. Museums, Stumme Liebe. Schiller, Lied von der Glocke.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300; or, Virgil, Æneid, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and

Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Act 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

*1st Year.*—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

*3rd Year.*—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

*4th Year.*—Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

N.B.—After Easter Term, 1878, Best on Evidence will be substituted for Taylor on Evidence; Smith on Contracts, for Leake on Contracts.

# Election Campaign Books.

## PROTECTION vs. FREE TRADE.

- Professor Fawcett, M.P. on Free Trade and Protection.** An Inquiry into the causes which have retarded the general adoption of Free Trade since its introduction into England. 8vo. . . \$2 25
- Frederick Bastiat on the Sophisms of Protection,** with Introduction by Horace White. 12mo. Cloth, extra . . . 1 00
- What is Free Trade?** An adaptation for American readers of Bastiat's "Sophisms of Protection." By Emile Walter, a worker. 12mo., cloth. . 0 75
- Protection and Free Trade; a Series of Essays.** By Isaac Butts. 12mo. Cloth, extra. . . . . 1 25
- Sumner (Prof. W. G., of Yale College.), Lectures on the History of Protection in the United States.** 8vo. Cloth, extra. . . 0 75
- Why we Trade, and How we Trade; or, an Enquiry into the extent to which the existing commercial and fiscal policy of the United States restricts the material prosperity and development of the country.** By David A. Wells. 8vo., paper . . . . . 0 25
- Friendly Sermons to Protectionist Manufacturers.** By J. S. Moore. 8vo., paper . . . . . 0 25
- Suffrage in Cities.** By Simon Sterne. 8vo., paper . . . . . 0 25
- Baird (Henry Carey), Protection of Home Labour and Home Productions necessary to the Prosperity of the American Farmer.** 8vo. . . . . 0 10
- Byles (Sir John Barnard), Sophisms of Free Trade.** 12mo. Paper, 75 cts; Cloth, . . . . . 1 00
- Richard Cobden's Speeches on Questions of Public Policy.** Edited by John Bright and Jas. E. Thorold Rogers. 12mo. Cloth . 1 50
- Edmund About. Handbook of Social Economy; translated by W. F. Rae.** 12mo. Cloth . . . . . 1 00

*Free of Postage on receipt of Price.*

**WILLING & WILLIAMSON,**

12 King Street East, Toronto.

## DIARY—CONTENTS—EDITORIAL NOTES.

## DIARY FOR SEPTEMBER.

2. Mon...Last day for delivery of appeal books.
4. Wed...Napoleon III. deposed, 1870.
5. Thurs. Lord Metcalfe, Gov.-General, died 1846.
6. Fri...Law Society Convocation meets.
7. Sat...Trinity term ends.
10. Tues...Sittings of the County Court of the County of York begin.
12. Thurs. Frontenac, Governor of Canada.
13. Fri...Quebec taken by British under General Wolfe, 1759.
14. Sat...Jacques Cartier arrived at Quebec, 1535.
16. Mon...Atlantic cable opened 1868. Sittings of Court of Appeal.
17. Tues...Toronto Assizes.
19. Thurs. Lord Sydenham, Gov.-General, died 1841.
24. Tues...Guy Carleton, Lieut.-Gov. and Com.-in-Chief, 1766.
30. Sir Isaac Brock, Pres. Can., 1811.

## CONTENTS.

EDITORIALS :	PAGE
Illness of Chief Justice Harrison .....	229
Fictitious Appeals .....	229
Report of Division Court Inspector for 1877 .....	229
Criminal Law in Quebec .....	230
Law of Divorce .....	230
Interest on Notes after maturity .....	231
Assignment of Choses in Action .....	231
Law Society, Easter Term, Resume .....	233
SELECTIONS :	
Our Unpaid Magistracy .....	236
"Devils" of the English Bar .....	239
Breach of Promise .....	240
CANADA REPORTS :	
ONTARIO—	
Insolvency Cases—	
Re Sanborn : .....	
Right of insolvent to retain watch .....	241
Re Killam : .....	
B. N. A. Act—Local legislation—jurisdiction .....	242
NOTES OF CASES :	
Queen's Bench .....	245
Common Pleas .....	245
Chancery .....	247
UNITED STATES REPORTS :	
Wakefield v. Newell .....	
Legality of Municipality .....	248
Colburn v. Chattanooga .....	
Municipal Law—Ultra vires .....	250
LAW STUDENTS' DEPARTMENT ;	
Examination Questions .....	251
CORRESPONDENCE .....	253
REVIEWS .....	253
FLOTSAM AND JETSAM .....	254
LAW SOCIETY OF UPPER CANADA .....	255

to seek change and rest, owing to a severe attack of illness. The best wishes of the profession and the public attend him. A little relaxation from the duties which he has so well and industriously performed, will, we trust, enable him shortly to return in renewed health and vigour. Mr. Justice Wilson at once, we understand, offered to give up his leave of absence, to assist in the judicial work during the Chief's absence. This is just the self-denying conduct we should have expected from that learned and devoted judge, but we trust that some arrangement will be made which will not render this sacrifice necessary.

The *New Zealand Jurist* falls foul of the Court of Appeal in that Colony for taking no exception to some fictitious appeals that were gravely argued before it by some professional gentlemen who possibly wished for an adjudication on some doubtful point, or who desired to air their eloquence or angle for business which was slow in coming to them. The Editor, who does not lack either energy, pluck or brains, must be a thorn in the side of a judiciary which, judging from the contents of the *Jurist* is not the wisest or most prudent in Her Majesty's dominions. It certainly is a serious offence to turn a Court of Justice into a Debating Club.

The Report of the Inspector of Division Courts for 1877 is before us. The first part is taken up with a discussion as to the taxation of clerk's and bailiff's fees; examples being given of bills of costs overcharged by those officers. These overcharges must have been a great source of unlawful profit to the officers, and corresponding loss to the litigating public. Much odium has fallen upon these Courts from conduct of this sort. If the Inspector has to any ex-

## Canada Law Journal.

Toronto, September, 1878.

We have delayed issuing this number so that we might include in it some notes of cases recently decided in the Court of Common Pleas.

The learned Chief Justice of Ontario has, we regret to learn, been compelled

## EDITORIAL NOTES.

tent remedied the evil he will have deserved the thanks of the community.

The most interesting part of the Report to the general reader is a return of Division Court business for the year ending November 30th, 1877. The Courts in the County of Wentworth (including Hamilton) can boast of having 4,468 suits entered, but they only collected \$35,186, whilst those of York (including Toronto), with about 4,800 suits, collected about \$56,000; Wellington, with about 3,600 suits, collected about \$43,000; Simcoe, with about 3,854 suits, collected about \$46,000; Northumberland and Durham, with 3,615, collected \$34,237; Bruce, with 3,527, collected \$38,991. The total number of suits entered, exclusive of transcripts of judgment summonses, were 73,374. The aggregate amount of claims entered was \$2,028,968, and the amount of money paid into Court was \$777,967. These figures do not include a number of divisions from which no returns were sent. There is a great difference in proportion between the number of judgment summonses in different counties, *ex gr.*, in York they were in the proportion of 808 to 4,215 suits entered; in Wentworth only 388 to 4,468 suits, &c.

The above figures give some idea of the importance of these Courts, and allow ample scope for those interested in the statistics to work out their own theories to their own satisfaction.

The criminal law is the same in every part of the Dominion. The law of evidence in criminal cases is also theoretically the same; but practically there is as much difference in the administration of justice in criminal cases in the Province of Quebec and the Province of Ontario as there is between our Statute Law and the Code Napoleon. We have

lately read in the daily papers the report of a prosecution in the City of Montreal of certain alleged Orangemen. Whatever may have been thought of it in Quebec, it would in Ontario bother even a lawyer, to say nothing of a layman to understand what the private notions of Sir Francis Hincks as to whether Orangism was objectionable or otherwise, or whether a green flag or an orange rosette was the more exciting to the average Celt, had to do with the prosecution of Mr. David Grant, who at that time, at least, had not even been shewn to be a member of the alleged secret society. To a lawyer whose studies have commenced with Blackstone and ended with the Criminal Statutes of Canada and a text-book on evidence in criminal cases, the proceeding is unintelligible and farcical in the extreme. Almost the only question of fact deposed to by this witness, appears to have been as to which was the shortest route from one spot in the city to another; any carman at the nearest cab-stand could probably have given more satisfactory evidence on the point. The whole thing is so incomprehensible to us in this Province that we cannot discuss it, but it does seem a pity that those who have in their hands the administration of criminal justice in the largest city in the Dominion should not be at some pains to understand something of the principles of evidence applicable to a criminal enquiry in a British Court of Justice.

It will be of some interest to note a decision of the Supreme Court of Indiana (*The State vs. Hood*, Chicago Legal News, 1877, p. 376), in connection with the case of *Reg. vs. Roy*, recently before our Court of Queen's Bench. In the former case, it appeared in evidence that the divorce was granted in Utah, in a

## ASSIGNMENT OF CHOSSES IN ACTION.

suit between two persons, neither of whom was, at the time of the proceedings, a resident of Utah. It was held, that neither of the parties had placed themselves under the jurisdiction of Utah, and that the Court in Utah had not, and could not have, jurisdiction to grant the divorce in question, and that the same was utterly inoperative and void: that the divorce was granted in violation of the sovereignty and jurisdiction of another State, and in violation of the plainest principles of international and constitutional law.

It was also held, that the decree of divorce in that case was not within the operation of that clause of the Constitution of the United States, which declares that full faith and credit shall be given in each State to the public Acts, records, and judicial proceedings of every other State. That clause does not include judgments, and decrees which show upon their face that the Court rendering them had no jurisdiction in the premises.—

In the case of *Reg. vs. Roy*, the Court held that the evidence failed to disclose a *bona fide* intention on the part of Roy, to reside in Utah. It was therefore unnecessary to decide as to the constitutionality of the act which *The State vs. Hood* declares to be unconstitutional.

The question whether interest is recoverable after maturity on a note at the rate (more than the legal rate) specified in it, when nothing is said as to the rate after maturity, has recently been decided in the negative in the Supreme Court of Maine, in *Eaton v. Boissonault*, 5 Rep. 270. The *Central Law Journal* thus comments on that case:—

"This decision is in accord with most of the authorities. It was so decided in *Ludwick v. Huntsinger*, 5 Watts & Serg. 51; *Brewster v. Wakefield*, 22 How. 118; *Burnhisel v. Firman*, 22 Wall. 170; and by the English House of Lords in the

recent case of *Cook v. Fowler*, L. R. 7 H. L. 27. This rule has been followed in Connecticut, in *Hubbard v. Callahan*, 42 Conn. 524, and in Rhode Island in *Pierce v. Swanpoint Cemetery*, 10 R. I. 227. The reason given by Lord Selborne, in the last English case, is, that interest for the delay of payment, *post diem*, is not given on the principle of implied contract, but as damages for a breach of contract; that while it might be reasonable, under some circumstances, and the debtor might be very willing to pay five per cent. per month for a very short time, it would by no means follow that it would be reasonable, or that the debtor would be willing to pay, at the same rate, if, for some unforeseen cause, payment of the note should be delayed a considerable length of time. In the Rhode Island case, the court says that if the parties to the note, or other contract for the payment of money, intend that it shall carry the stipulated rate of interest till paid, they can easily entitle themselves to it by saying so, in so many words. On the other hand, in a recent case in Massachusetts, the court held that when a recovery is had upon a note bearing ten per cent. interest, the plaintiff is entitled to interest at the same rate till the time of verdict. *Brann v. Hursell*, 112 Mass. 63. The reason given is, that 'the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt, and is entitled to the rate fixed by the contract.'

The rule in this country has, up to this time, been in favour of the rate of interest fixed by the parties. See *Howland v. Jennings*, 11 C. P. 272; *Montgomery v. Bouden*, 14 C. P. 45; and *Young v. Pluke*, 15 C. P. 360.

## ASSIGNMENT OF CHOSSES IN ACTION.

The former general rule of law that choses in action cannot be assigned so as to give to the assignee a right to sue for it at law in his own name, has been to a considerable extent changed by the late Statute of Ontario, 35 Vict. c. 12, which



## ASSIGNMENT OF CHOSE IN ACTION.

now forms part of the Mercantile Amendment Act in the Revised Statutes (c. 116, ss. 6, 12). The Act is retrospective in this sense that it applies to assignments of debts and the like made before it came into operation, so as to give the assignee the right to sue in his own name: *Cole v. Bank of Montreal*, 39 U. C. R. 54, and *Wallace v. Gilchrist*, 24 C. P. 40.

It has been held that the Act does not apply to cases where the assignment is made by way of pledge to secure a smaller sum and when the assignee has not absolutely transferred his whole interest: *Hostrouser v. Robinson*, 23 C. P. 350. But the Act may properly extend to the assignment of one of the payments in a mortgage payable by instalments, or a specific sum of money due on a covenant in a deed providing for other independent matters between the parties, or for one of two distinct claims embraced in an award: see *Wellington v. Chard*, 22 C. P. 518. So a valid assignment under the statute can be made of a sum of money awarded, without an assignment of the bond of submission as the foundation of the contract: *Id.*

Neither does the Act extend to cases where the assignee holds the chose in action as a trustee for others and without any beneficial interest therein himself. To borrow the language of Chief Justice Moss, the Legislature had no intention of permitting the holder of a doubtful claim to transfer it for the mere purpose of litigating it in the name of the assignee and of avoiding personal responsibility. That would invite serious abuses of the law: *Wood v. McAlpine*, 1 App. R. 242. Of course, the Act was never intended to make claims assignable which by the policy of the law could not be validly assigned before the statute was passed, such as the future half-pay of an officer and a bond

given by a husband and his surety to a trustee to secure payment of future alimony to his wife, in pursuance of a decree of the Court of Chancery: *Reiffenstein v. Hooper*, 36 U. C. R. 295. Apart from this consideration however a future debt or a contingent debt may be validly assigned: *Percy v. Clements*, 22 W. R. 803.

Among other cases decided upon this statute may be mentioned *Fowler v. Vail*, 27 C. P., 417, where it was held that a judgment was *prima facie* a debt and as such assignable under the Act so as to enable the assignee to sue therefor in his own name: *Blair v. Ellis*, 34 U. C. R. 466. In this case a curious question arose as to the effect of one partner assigning to his partner and himself a debt due from the defendant to the assignor. It was determined that both partners could sue for the debt in their joint names. In *Howell v. McFarland*, 2 App. R. 31, it was held that one partner had the right to assign debts due to the firm, so as to entitle the assignee to sue for the debts under the statute.

As to matters of pleading it has been decided that allegations in declaration that a chose in action was duly assigned in the manner required by the Act are sufficient upon demurrer: *Cousins v. Bullen*, 6 P. R. 71. Also, that where it appears that the assignor has divested himself of all beneficial interest, and the thing assigned is a debt or chose in action, the action *must* be brought in the name of the assignee: *Dawson v. Graham*, 41 U. C. R., 540. And in *O'Connor v. McNamee*, 28 C. P. 141, it was laid down that a party who assigned a debt to another could on a re-assignment to himself sue as if he had never assigned, and that he could reply such re-assignment to a plea setting up the assignment and that there would be no departure.

Upon the whole, and having regard to

LAW SOCIETY, EASTER TERM.

the Administration of Justice Act, this statute has made no very great or important change in the law. No doubt the object of the Legislature was to enable a person, who had become beneficially entitled to a chose in action, to sue upon it at law in his own name, instead of being obliged to use the name of his assignor, or to resort to a Court of Equity: *Wood v. McAlpine*, 1 App. R. 241. And to the extent to which the Act applies, assignees of choses in action have a status and condition assigned to them by the statute law of the land; and for all matters touching their rights, privileges and liabilities, we must henceforth look to the statute law, the construction of which in all Courts must be uniform according to the terms expressed in the statute: *Smith v. Niagara District Mutual Insurance Company*, 38 U.C.R. 577. But when it is remembered that the assignment of debts and choses in action was always recognized in Equity and could be enforced there by the assignee, and that by the Administration of Justice Act, a purely money demand may be prosecuted at law, although the plaintiff's right to recover may be an equitable one only, it is evident that the special Act under consideration is not of much practical efficiency. In fact it may be broadly said that the Administration of Justice Act does in effect embody the terms of one of the general orders of the Court of Chancery, whereby it is provided that an assignee of a chose in action may institute a suit [action] in respect thereof without making the assignor a party thereto: G. O. 58; R. 7.

LAW SOCIETY.

EASTER TERM, 1878.

The following is the *resumé* of the

proceedings of Convocation during this Term, published by authority.

MONDAY, 20th May, 1878.

The minutes of last meeting were read, approved and adopted. The following gentlemen received certificates of fitness to practise as Attorneys, namely:

Messrs. T. G. Meredith, M. Wilson, I. Campbell, T. Ridout, O. R. Macklem, W. F. Franks, W. E. Higgins, J. J. Manning, J. W. Holmes, J. Robinson, J. Craig, H. Vivian, and L. Olivier.

The petitions of Messrs. Galt, Dow, Beck, Sheppard, Simpson, Anderson, Riordan, J. Hodgins, Brown, Doyle and Hardy were referred to the Committee on Legal Education.

The report of the Examiners on the Intermediate Examination was received and adopted.

The report of the committee appointed last Term to meet the Attorney-General on the subject of fees payable for shorthand writers' notes, was received and read, reporting that an Order in Council had issued, reducing the fees for shorthand writers' notes.

The report of the committee on the petition of Thomas G. Rothwell was read, recommending that its prayer be granted.

The petition of John Rowe was referred to the Finance Committee.

The petitions of Messrs. Glenn, McLean, McDonald, and Lefroy were referred to Committee on Legal Education.

TUESDAY, 21st May, 1878.

The minutes of last meeting were read and approved.

The Legal Education Committee reported that Mr. Lefroy had been duly called to the English Bar, and had complied with the Rules of the Society, of June, 1876, and was entitled to be called to the Ontario Bar.

## LAW SOCIETY, EASTER TERM.

Ordered, that Mr. Lefroy be called to the Bar.

The petition of Mr. Theodore King, a member of the English Bar was referred to the Committee on Legal Education. The petition of Mr. Harcourt was referred to the same Committee.

The report of the Examiners for Call to the Bar was received.

Ordered, That Messrs. Meredith, Galt, Mackelcan, Christie, Simpson, Anderson, Worrell, Wells, Craig, Nicholls, Hardy, and VanNorman be called to the Bar.

The gentlemen named, and Mr. Lefroy were accordingly called to the Bar.

The report of the Committee on Legal Education on the Primary Examinations was received and read. The following gentlemen were admitted :—

*Graduates.*

Messrs. Cruickshank, Herald, Ballagh, Bell, Curry, Macdonald, Ritchie, the Hon. David Mills.

*Matriculants.*

Messrs. Yarnold, Howard, and Anderson.

*Junior Class.*

Messrs. Chapple, Leeming, Mills, Muligan, Macrae, Fraser, Hamilton, H. C., McKenzie, Mahaffy, Lees, Monk, Werrett, Thurston, Morphy, Titus, Hearn, Murchison, Wallbridge, Walker, Kean, Beardmore, Fowlds, Mahoney, Garvin, Martin, Hammond, Ruttan, Haight, Atkinson, Stewart, Kilgour, Conacher, Mylne, O'Keeffe, Sorley, Greene, Reid, Mensies, Reynolds.

*Articled Clerks.*

Messrs. Wright, Holmes, Lawrence, Hawkesworth, Start.

The report of the Finance Committee on the case of John Rowe was adopted, directing his certificates to issue, on payment of arrears of fees.

The Balance Sheet for the first quarter of 1878 was laid before Convocation.

SATURDAY, May 25th, 1878.

The minutes of last meeting were read and approved.

The Hon. Stephen Richards, Q.C., was re-elected Treasurer of the Society for the coming year.

The following Standing Committees were appointed :—

*Finance.*—D. B. Read ; Hon. James Patton ; Hon. M. C. Cameron ; John Crickmore ; D. McCarthy ; E. Martin, F. Osler.

*Reporting.*—James Maclellan ; James Bethune ; B. M. Britton ; E. Martin ; J. Hoskin ; D. McCarthy ; F. McKelcan.

*Library.*—Æmilius Irving ; Thomas Hodgins ; F. Mackelcan ; H. Cameron ; D. McMichael ; Jas. Bethune ; Jas. Miller.

*Legal Education.*—Thos. Hodgins ; T. M. Benson ; T. Robertson ; Hon. A. Crooks ; F. Osler ; J. Crickmore ; A. Leith.

*Discipline.*—F. Osler ; J. Maclellan ; Thos. Hodgins ; T. M. Benson ; J. Hoskin ; D. McMichael ; Thos. Robertson.

The Legal Education Committee reported that Mr. Theodore King had been duly called to the English Bar, and had complied with the Rules of the Society, of June, 1876, and was entitled to be called to the Bar of this Province.

Ordered, That the Report be adopted, and that Mr. King be called to the Bar. Mr. King presented himself, and was called accordingly.

The same Committee recommended that Mr. Harcourt be allowed his second Intermediate Examination as of Hilary Term, 1878.

The same Committee recommended that Mr. Joseph Woodman may receive his Certificate of Fitness.

Ordered, That a Certificate of Fitness be granted to Mr. Woodman.

## LAW SOCIETY, EASTER TERM.

The same Committee recommended that Mr. W. J. Eyre be admitted as an Articled Clerk as of Hilary Term, 1878, and Mr. H. P. Drought as a Student-at-Law as of the same Term.

Ordered, that this Report be adopted.

The Report of the Examiners of the Law School was laid before Convocation and ordered to be considered in Trinity Term.

A communication was received from the Librarian relative to the abstraction of one of the books (Leake on Contracts) from the Library, and its retention for many months by a member of the Society.

Ordered, That the communication be referred to the Committee on Discipline.

Messrs. Ridout, McDougall and Murdoch were called to the Bar.

Mr. Hodgins' Rule for the establishment of a Fund, to be called, "The Law Benevolent Fund," was referred to a committee composed of the Treasurer, and Messrs. M. Cameron, Leith, Irving, Hodgins, Read, Maclellan, and Crickmore.

Ordered, that Mr. Beck receive a Certificate of Fitness, on furnishing proof that he has served three years from 8th June, 1875, under articles of clerkship.

Ordered, That Messrs. Evans and Kingsford be paid for conducting the Primary Examinations of this Term, and be appointed Examiners for next Term.

Ordered, That Mr. Michael J. Doyle receive his Certificate of Fitness.

## FRIDAY, 7th June, 1878.

Ordered that Mr. Henry Ryerson Hardy receive his Certificate of Fitness.

The chairman of the Reporting Committee presented two reports, one referring to the vacancy occasioned by the death of the Reporter of the Court of Queen's Bench, and the other stating

the progress that had been made in the Reports of the various Courts.

Ordered, that these reports be received, read, and considered forthwith.

The reports were accordingly read, considered, and adopted.

Ordered, that the Secretary give notice under Rule 104, of the intention to appoint a Reporter for the Court of Queen's Bench at the meeting to be held on 25th June.

The petitions of Messrs. Crowther, Glenn, McLean, Bain, McKenzie, Riordan, and Dow, were referred to Legal Education Committee.

## SATURDAY, June 8th, 1878.

The Reports of the Legal Education Committee on the petitions of Messrs. Harcourt, Brown, and Dow were adopted.

The petition of C. E. Macdonald, asking that his Intermediate Examination passed as a Student-at-Law be allowed him as an Articled Clerk, was granted.

Messrs. Black and Robertson were appointed Auditors for 1878.

Mr. Hodgins was appointed the Representative of the Law Society in the Senate of the University, from Easter Term, 1878, up to Easter Term, 1879.

The Report of the Examiners on the Law School Examinations was referred to the Legal Education Committee.

## TUESDAY, June 25th, 1878.

The Reports of the Legal Education Committee on the petitions of Messrs. Crowther, Bain, Riordan, Dow, McKenzie, and Rolph were adopted.

Mr. Wood's petition was referred to same Committee.

Mr. W. E. Hodgins' petition relative to new Ontario Law List and Legal Directory was referred to the Finance Committee.

The Report of the Finance Committee

## OUR UNPAID MAGISTRACY.

recommending the investment of the Reserve Funds of the Society in Government securities was adopted.

The Treasurer laid before Convocation a letter from Robert G. Dalton, Esq., Clerk of the Crown and Pleas, Queen's Bench, dated 15th June, 1878, enclosing a Rule in the matter of the Hon. J. G. Currie, one of the Attorneys of the said Court of Queen's Bench, which Rule was made absolute on the 7th June, A. D. 1878.

Salter J. Vankoughnet, Esq. was appointed Reporter of the Court of Queen's Bench.

## SELECTIONS.

## OUR UNPAID MAGISTRACY.

In these days we are by no means in danger of setting too great store upon the "Wisdom of our Ancestors." The phrase itself, from an undue and foolish employment of it in the last generation, has been ridiculed in this; and we are much more likely in these days to fall into the error of denying due credit to the sagacity of our forefathers. If ancient institutions have become unsuited to modern requirements and modes of thought, it may be that this is owing in some cases not so much to the intrinsic crudeness of the institutions themselves, or to the quickened intelligence of a more enlightened age, as to a misconception of the designs of our ancestors and a neglect of the precautions which they were careful to observe.

If is often quoted as a great anomaly and even a great abuse in our elaborate civilization, that so large and important a share in the administration of justice should be confided to men of no legal training, and whose only qualification for the exercise of judicial functions is the possession of a certain social status. Coke speaks of the jurisdiction of Justices of the Peace as "such a form of subordinate government for the tranquillity and quiet of the realm as no part of the Christian world hath the like." And it would still be difficult to find a counterpart to this emphatically English institution. Year after year the Press is full of complaints of the incompetency of the "Great Unpaid," and yet year by year fresh judicial duties are imposed upon them. Large towns have found refuge from the ignorance of amateur tribunals in securing the services of trained

lawyers as "Stipendiary Magistrates," and the Court of Quarter Sessions has been rendered to a great extent innocuous by the prevailing influence of the Recorder. But an enormous mass of judicial business is every day transacted by men who, ignorant of the elements of law, are almost at the mercy of noisy and unscrupulous solicitors. Making all allowance for misstatements and exaggerations, no one, who knows anything of the administration of the law in England, can doubt that serious miscarriages of justice are very frequent in our inferior tribunals. The main argument indeed in favour of the existing treatment is its cheapness. The work may be ill done, but it is done for nothing. And the general substitution of Stipendiary Magistrates for the ordinary Justice of the Peace would involve a heavy burden on the rates.

It is perhaps worth while to refer back to the origin of the commission of the peace, and observe how our legislators of five hundred years ago took pains to secure a magistracy at once trained and gratuitous.

Justices of the Peace were first appointed at the beginning of the reign of Edward the Third. The "Conservators of the Peace," who existed previously to that time do not appear to have exercised functions of a judicial nature. What should constitute the qualifications for the new office, early became a matter of legislative solicitude. A Statute passed in the eighteenth year of the reign of Edward the Third, says:—"Two or three of the best of reputation in the counties shall be assigned Keepers of the Peace by the King's Commission; and at what time need shall be, the same, with *other wise and learned in the law*, shall be assigned by the King's Commission to hear and determine felonies, &c." Whatever may have been its precise meaning, this Act does not appear to have been carried out very successfully; for three years later we find the Commons charged to advise the King what was the best way of keeping the peace of the kingdom; and they thereupon recommended that six persons in every county, of whom two should be "*de plus grantz*," two knights, and *two men of the law*, and so more or less as need should require, should have power and Commission out of Chancery to hear and determine the keeping of the peace. No further statute, however, seems to have been passed upon the subject, until the 34 Edward III., c. 1., which enacts that, "In every county of England shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the same county, *with some learned in the law*." Again, in the thirteenth year of Richard II., we find a similar provision: "Justices of the Peace shall be made of new

## OUR UNPAID MAGISTRACY.

in all the counties of England, of the most sufficient knights, esquires, and gentlemen of the law of the said counties."

From these statutes there appears a proper jealousy of entrusting the decision of legal disputes entirely to the discretion of unprofessional men, and from the language of the last statute cited, it is evident that at this early period there must have been a considerable number of educated lawyers resident in the counties, from amongst whom it was proposed to select some of the Justices. There are many proofs that soon after the Norman Conquest the study of law became popular amongst the ruling classes of the country. This taste developed itself in a remarkable degree during the Plantagenet period. It is impossible for the Londoner to traverse the innumerable courts and quadrangles associated with the names of ancient Inns, which abound in that great law territory lying between Drury Lane and the Old Bailey, and from the river northwards to Bedford Row and Smithfield, without reflecting that he is amidst the ruins of a great University. The quaint halls of the remaining Inns of Chancery, with their emblazoned windows looking out on trim parterres, the stately gardens of Gray's Inn, and the terraces of the Temple involuntarily remind the Oxford or Cambridge man of his undergraduate days, and the more classic sites upon the banks of the Isis and the Cam. Fortescue, writing in the reign of Henry the Sixth, tells us that there were at least 100 students in each of the ten then existing Inns of Chancery, and in some of them a greater number, and that in the smallest of the Inns of Court there were full 200 students. There must, therefore, have been about 2,000 Students of Law at that time in London. The number seems incredible when we consider the comparatively small population of the country in that age. Macaulay estimates the population of England, in the year 1685, at about five and a half millions, and two hundred years before that date, it must have been much smaller. At the present day, when London alone has a population of nearly four millions, and when, not only this country, but India and our vast Colonies, present wide fields for practice to members of the English bar, there are not more than 2,300 or 2,400 students at the four Inns of Court, and some of these are Irish gentlemen, who only keep four terms, and are called to the Irish Bar by the King's Inns of Dublin. Fortescue's figures are, however, somewhat misleading. According to a Commentary on his "*De Laudibus*," written in the reign of Henry the Eighth, it appears that, under the name of Students, the author included the Inner and Utter Barristers (or "Apprentices") of the

Four Greater Inns. It appears also that the number of students was very much greater in the reign of Henry the Sixth than in that of his father. This increase was due, probably, not so much to a greater demand for barristers, as to a growing recognition of the utility of attorneys, a class of practitioners who, as yet comparatively few in number, had only recently begun to assume an independent existence, and who still pursued their studies along with the junior students of the Bar at the Inns of Chancery. We have a curious proof of the multiplication of attorneys, in the time of Henry the Sixth, in a statute of his reign, which recites that not long previously there were only six or eight attorneys in all Norfolk and Suffolk, "*quo tempore magna tranquillitas regnabat*;" but that they had recently increased to 24, and much strife and litigation was said to be the result.

Nevertheless, after taking everything into account, it remains certain that the proportion of Students of the Bar to the population of the country in early times was considerably greater than at present. It is not too much to say that, in the time of Fortescue, while Oxford and Cambridge were the Universities of the poor, the London Inns of Court and Chancery were the University of the rich. The former were wealthily endowed, and the students were for the most part pensioners; at the latter, the well-to-do youth of the country supported themselves at their own expense, and lived in considerable luxury. Oxford and Cambridge were the training schools for the Church, the London Inns were nurseries for the Bar and the Council. At the Inns of Chancery, at which the student passed a year or two of study before being admitted to one of the four great Inns of Court, the curriculum was by no means confined to Law; it embraced, as we learn from the "*De Laudibus*," sacred and profane history, music, dancing, singing, and other accomplishments. "All vice was discountenanced and banished," says Fortescue, "and everything good and virtuous was taught;" a rather overdrawn eulogium, or else, if we may accept Shakespearean allusions as trustworthy, degeneracy very soon set in. In course of time it became customary for a young man to graduate at Oxford or Cambridge before proceeding to his studies in London. In the time of Elizabeth, this was perhaps the general practice, and thus it happened that the general education afforded by the Inns of Chancery became unnecessary; those ancient institutions gradually broke off all connection with the Inns of Court, and fell wholly into the hands of the lower branches of the legal profession.

It is probable that only a small propor-

## OUR UNPAID MAGISTRACY.

tion of those who, in early times, passed through the Inns, even actually practised, or intended to practise, at the Bar. Under the Feudal System, a knowledge of law was of vital importance to the landowning classes. The Hundred Courts and the Courts Baron were far from being mere registries of real property or tribunals for the exaction of manorial rights. They were invested with considerable civil and criminal jurisdiction. The lord of the manor prided himself upon his civil rule as well as upon his martial prowess, though we learn more from history of the latter than of the former. It was not only cadets, but the future heads of noble houses, who became students of the Common Law. The wealthy lords of many manors were compelled to employ stewards to perform, at least, a part of their judicial functions, and that a considerable amount of legal learning was considered a necessary qualification for presiding vicariously over the Feudal Courts, may be gathered from Chaucer's description of the Manciple of the Temple :

"Of masters had he more than thrice ten  
That were of law expert and curious,  
Of which there was a dozen in that house  
Worthy to been stewards of rent and land  
Of any lord that is in England."

It is not necessary to suppose that many of the aristocratic students of the Inns went through the formality of being "called" to the Utter Bar. Most of them, probably, contented themselves with such elementary learning as could be acquired at the Inns of Chancery, without proceeding to the Inns of Court at all. It may be conjectured, that the expressions "men of the law," and "the learned in the law," used in the statutes of Edward the Third and Richard the Second, which have been quoted, were intended to include all who had received their training at the London Inns, whether actually called to the Bar or not. Justice Shallow is represented by Shakespeare as having been educated at Clement's Inn, and it may be inferred that he never proceeded to one of the Inns of Court, or he would have bragged of it as he did of his doings at Clement's Inn. It is not unlikely that Lucy of Charlecote, who sat for Shallow's portrait, was himself an ex-student of Clement's Inn, or some other Inn of Chancery, and selected on that account as a member of the Commission of the Peace. The supposition, that the expressions "men of the law," and "the learned in the law," may receive the liberal interpretation here assigned to them, and that membership of an Inn of Chancery was deemed a qualification for the Magisterial Bench, derives some confirmation from the fact that this was exactly the qualification required in those days for the exercise of

the profession of an attorney. The history of attorneys is somewhat singular. They were originally mere proxies, and before the thirteenth year of Edward the First, no one could be appointed to that office without letters patent. And for a considerable period after that date, the persons usually selected as attorneys were counsel below the degree of serjeant. By degrees the two professions became distinct, and attorneys were appointed exclusively from amongst members of the Inns of Chancery. For some time, indeed, this was the only qualification required; and it was not until the reign of Henry the Fourth, that a test examination of learning and fitness was imposed upon candidates for the office of attorney. So late, indeed, as the reign of Queen Anne, a rule was made requiring all attorneys to come to Commons at the Inns of Chancery. This rule has long been obsolete, and now the Incorporated Law Society alone superintends the legal training of solicitors. Such of the Inns of Chancery, however, as remain are yet in the hands of small coteries of members of the profession, who, under the names of "Principals," "Ancients," "Chief Rulers," &c., maintain many curious customs and ceremonies in connexion with these ancient Institutions, and dine in their respective halls three times during every Law Term. There are several remaining traces of the common origin and educational connexion of barristers and attorneys. Until quite recently a limited number of attorneys were admitted as Students of the Inns of Court, and there is even now a venerable solicitor, the last surviving possessor of this privilege, who makes a point of dining once or twice during every term in Gray's Inn Hall, where he takes his place next below the junior barrister for the time being. The sleeveless gown which is used by solicitors who practise in the County Courts is no other than the ancient law student's gown, worn still during the dinner hour alike by candidates for the Bar at the Inns of Court, and by the remaining members of the Inns of Chancery.

It can hardly be doubted that attorneys were included amongst the "men of the law," upon whom it was thought desirable by our ancestors of the fourteenth century to confer a share in the duties of the magistracy. A statute, passed early in the present reign, and the propriety of which cannot be for a moment doubted, has, however, now virtually excluded practising solicitors from the Commission of the Peace.

The question is, perhaps worth mooting in our own days if it not feasible, as it certainly would be beneficial, to insist upon some degree of legal training as an essential qualification for the magistracy.

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"DEVILS" OF THE ENGLISH BAR.

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To become a J. P., ought to be an object of honourable ambition amongst county families. If a condition were imposed that none but barristers should be appointed to the commission, those socially eligible for the post would probably lose no time in qualifying themselves. The examination for call to the Bar is no longer merely nominal. Without entailing a very long or severe course of study, it secures at least a fair knowledge of general principles, and certainly any one who has passed it would be much better prepared to partake intelligently in the administration of justice, than one absolutely without legal education. He would have acquired, if little else, something of what is known as a "legal mind."  
—*Law Magazine.*

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"DEVILS" OF THE ENGLISH  
BAR.

Considering the antipathy which any experience of the law excites among suitors, it is wonderful what fascination it seems to exercise over some of its exponents, or rather over its would be exponents. We refer to that numerous class of young barristers who pursue the avocation of "devils." To the uninitiated we will explain what is meant by a devil. The picture is not to the lay mind a very attractive one, and yet there are a good many young gentlemen at the Bar who would give one of their ears to be in the shoes of a more fortunate friend who occupies the proud position of devil to a leading junior. In the first place, a devil has no work of his own; if he had he could not properly exercise his demoniac functions. His duties consist in getting up masses of papers, and in holding the less interesting [of the] briefs of another barrister who has got more work than he can get through; in getting abused by the solicitor who does not approve of the work being done by a deputy, and who, if the case is lost, puts it down to the incapacity of the deputy aforesaid, and if it is won never dreams of awarding any thanks, still less briefs, to the winner. And the odd part of it all is that not one groat does the devil receive. He has to keep up chambers, a share of clerk, and himself, and to be constantly at the beck and call of his patron, for he knows if he is not, or if the work be carelessly done, there are

seven, or, indeed, seventy others, worse or better than himself, as the case may be, ready to seize on the post with avidity. Another odd feature of the profession is, that the devil really enjoys his work until he gets tired of it. In no other profession that we know of is there presented the spectacle of one man doing another's work for nothing and really liking it. He is not always, to the non-legal mind, a very interesting person to meet in general society, for his conversation is apt to confine itself to recent cases, and the "points" taken or not taken therein, interspersed with choice legal anecdotes, which are about as suitable at an ordinary dinner party as Mr. Bob Sawyer's illustration of the removal of a tumor from a gentleman's head, by means of a quartern loaf and an oyster knife, was at Dingley Dell. Of all shop—and shop of any kind is wearisome—legal shop falls the flattest on the ordinary diner-out.

The advantages which are gained, or are supposed to be gained by deviling are, firstly, that the young barrister gets experience, and what is of most importance, something to do during the weary years of waiting which tail off so many; secondly, that he is supposed to have opportunities for making friends of the Mammon of Unrighteousness in the shape of solicitors who, when the leading junior to whose skirts the devil clings, passes into the smooth harbour of "silk," will bestow on him the briefs which they formerly showered on his patron. Too often the hope is a delusive one, and after having served so many years for the Rachel of practice, the legal Jacob sees her pass into the arms of a whiskerless stripling just out of his pupillage, who is the son or the nephew, or more often the son-in-law of a solicitor. It is no new discovery that there is a block in all professions, and that in no profession is there anything like the block that there is at the Bar. It is no exaggeration to say that there is work for ten and a hundred to do it. No man without interest should in these days dream of going to the Bar unless he is possessed of exceptional abilities, and even then he must be sure that they are the right sort of abilities.



## BREACH OF PROMISE.

Learning will not serve him without tact; and above all he must cultivate what is called a good manner both with judges and juries. We once heard a judge say of an eminent Queen's Counsel that there was something about his manner which made him *want* to give him the case whatever his own opinion might be as to the justice of his cause. But better far than the most transcendent abilities it is to have an uncle a solicitor. And now a word as to solicitors. There doubtless are many firms of solicitors who look after the interests of their clients in the matter of employment of counsel with scrupulous honour, and who only give their brief to those whom they think most likely to conduct the case to the best advantage; but there are an increasing number of solicitors who adhere too closely to the Scriptural doctrine that it is a man's duty to provide for his own family first, and who intrust the interests of their clients to the care of their barrister relations, regardless of their incapacity to do more than scramble through the work somehow. It is, perhaps, natural that they should do so, but it is the presence of so many barrister-solicitors, or solicitor-barristers, which crowds out an immense number of really capable men who come to the Bar provided with brains but unprovided with interest. Some twenty or thirty years ago a man coming to the Bar with a University reputation, and with the patience to let the profession see that he meant to stick to it, was certain to make a living, sometimes a fortune. Now it is very long odds that he will not make either.

No doubt the prizes at the Bar are such as to make it worth while for a man to go through a good deal to gain them, and the excitement of a "talking" practice, when once obtained, seems to have a fascination which renders it impossible for him who has once experienced it ever to retire into private life again, whatever his personal means may be. Sir Edmund Beckett, the present leader at the Parliamentary Bar, who is supposed to have inherited two fortunes and to have made a third at the Bar, was once asked why he did not give up practice now that he was such a rich man, and he

is said to have replied that "It was the cheapest amusement he could find." Probably there are many parliamentary barristers who wish Sir Edward would invent a more expensive one.

The as yet briefless one has, however, many reasons for thinking his own profession is not such a hard one after all, even if he does not rise through the successive gradations of leading junior and Queen's Counsel, and a seat in Parliament, to being Attorney-General and finally to the Bench; he knows that there are many little pickings in the shape of County Court Judgeships and Police Magistracies, which cannot go outside his own profession.—*London Week.*

## BREACH OF PROMISE.

A bill introduced into the British Parliament by Mr. Herschell, Q.C., to abolish the action for breach of promise of marriage, has been received by the newspapers, according to the *Solicitors' Journal*, with "a chorus of approval." The *Law Times*, in a very able article on the subject, warns the framer of the bill that he must not expect to succeed without opposition, for, it says, the institution has many admirers and more readers. But, like other idols of a people or a class, this one stands condemned as an offence to good taste, and an exception to sound principles. As a tolerated custom, the action for breach of promise of marriage has long been extinct on the male side of the question. No well-advised man would venture to call a woman into court for not fulfilling her promise to marry him. Yet no difference can be pretended between the case of the woman and that of the man. There are, indeed, women who say that there is a difference—that a man can easily find a wife, and that his prospects are not blighted by a disappointment of this kind; but the women who say this are not the women to be listened to on such a question. These actions are confined not only to women, but to a peculiar class of women—scheming, enterprising, and anxious to hook a victim. For the woman has suffered no loss, but rather gain, by a man breaking his word, for her interest can be only the same as his; and if it is best he should not marry her, it is equally best that she should not marry him, which is really the question at issue.

The moral obligation to fulfil a promise to marry is so great, that there can be no doubt it often prevails over considerations that should decide the other way. If a

## RE SANBORN, AN INSOLVENT.

man finds on reflection that he was not justified in promising a happy home, for he had not the means of fulfilling that promise, or finds, on better acquaintance, that he was mistaken in his estimate of the lady, or that she was mistaken as to him, it certainly is advisable that he should not be held bound to what is more or less wrong. Even in the extreme case of a change of feeling, for no assignable reason but the merest caprice, or because the man has seen somebody else that he likes better, it has to be remembered that in the ceremony of marriage the man promises to love the woman, which, in this supposed case, he does not, and can not do. The woman who sues a man at law for breaking his promise, has to complain that he would not marry her, even when he had ceased to love her, and she, therefore, claims for a husband a man that does not love her, and tells her as much. Such a claim is almost revolting; but it really is the claim that is made in these cases. A lady of delicate feeling would rather die than make it, whether in private, or, still more, with all the glaring publicity of an assize court, amid the scowls and the sneers of an assembled county. When a promise is broken, both parties must feel that a great mistake has been made, and that now the less said or done about it the better. There will be more blame on one side than on the other, and society will award to each their due share. The offender, of whichever sex, does not go unpunished, for the broken word will never be forgotten, and nobody will ever listen to another promise made by such a person, without the reflection that he cannot quite answer for himself, and is not to be entirely relied on. Vacillation, caprice, unsteadiness of principle or feeling, are scarcely less contemptible than formal breach of promise, and any sensible man or woman will beware of those who can not depend on themselves, and, therefore, can not be depended on by others.

The existing state of the law making a promise to marry a legal contract, defeats its purposes by encouraging long engagements and endless delays. We cannot but be sorry to deprive people of one of their amusements. But good taste has put an end to many other amusements not more exceptionable. Cock-fighting, bull-baiting, and the prize ring are things of the past in respectable quarters in this country, and it is quite time that the action for breach of promise of marriage should follow them.—*Central Law Journal.*

## CANADA REPORTS.

## ONTARIO.

INSOLVENCY CASES.  
COUNTY COURT OF MIDDLESEX.

## RE SANBORN, AN INSOLVENT.

*Right of an Insolvent to retain his watch from the Assignee.*

*Held*, that an insolvent has no right to retain a valuable and expensive watch from his assignee on the ground that it is necessary and ordinary wearing apparel. [London.]

This was an application under the 143rd section of the Insolvent Act of 1875 for an order to require the insolvent to deliver up his watch to the assignee.

*Bertram* opposed the application.

*E. Meredith, contra.*

ELLIOTT, Co. J.—The 16th section of the Insolvent Act of 1875 vests in the assignee all the personal property of the insolvent, except such as is exempted from seizure and sale under execution.

By the 2nd section of chapter 66, Revised Statutes of Ontario, the necessary and ordinary wearing apparel of the debtor and his family is exempted from seizure under execution.

The question is, whether the watch of the insolvent, valued at \$150, and which he has been in the habit of wearing on his person, comes under the head of necessary and ordinary wearing apparel. If it does not, then the insolvent has no right to withhold it from the assignee.

I am referred to the definition of the word "apparel" as given in Worcester's Dictionary and elsewhere, from which it appears that this word does not mean clothing alone, but comprises also such ornamental things as are usually worn. It is accordingly contended that a watch being an article which is usually worn on the person, not so much for ornament as for use, must be regarded as an article of necessary and ordinary apparel. This might lead to serious consequences. For instance, a person perceiving that insolvency was likely to overtake him, might invest a large portion of his funds, or indeed in some cases he might readily invest all his probable assets, in the purchase of a costly watch, set with costly jewels, and claim to have it exempted from the control of the assignee, and thus preserve his property from his creditors. Perhaps so gross a case might come within the domain of fraud, and in this way the insolvent might be reached. But it is easy to see how a very large expenditure could be incurred in the purchase of a valuable watch, and secured to the

## IN RE KILLAM, EX PARTE.

insolvent, if in all cases a watch can be said to be a necessary and ordinary article of apparel. In this case the insolvent's estate will pay 20 cents in the dollar, and previous to his final collapse he compounded with his creditors for 60 cents in the dollar. Some eight months previous to the composition he became the purchaser of this watch, which he values at \$150. Now was this watch such an article as in ordinary cases would be worn by a person in his condition? I think it is not reasonable that a man pecuniarily situated as he was, should have \$150 invested in a watch. Neither is it shown that there was any necessity for his having a watch at all. Nothing more is urged than the usual convenience of a watch to any one. If this was a common inexpensive watch, I should feel disinclined to accede to this petition. But the words, necessary and ordinary, must be taken to have a relative significance. That is to say, this meaning must be governed by comparison and by circumstances. *Spitzer v. Chaffer*, 14 C.B., N.S., 714, shows that there is a substantial distinction between wearing apparel and necessary wearing apparel. In this case I feel myself compelled to look to the reasonableness of the thing, otherwise a man might, as I have said, invest a very large sum in a watch, or it might be in a diamond pin, or some such article, and claim to have the article exempted, thus opening the door to a fraud upon his creditors.

*Eunbol v. Alfred*, 3 M & W., 249, is sufficient to show that the watch could not have been seized under an execution while on the person of the debtor, but that question is not important here, inasmuch as no seizure is in question. All that is asked for is an order for the insolvent to give up the watch. I think this order should under the 143rd section be allowed. The costs of the application to be paid out of the estate.

Order accordingly.

## NOVA SCOTIA.

## COUNTY COURT, YARMOUTH.

## IN RE KILLAM, EX PARTE.

*Insolvent Acts—British North America Act—Local Legislation—Jurisdiction.*

*Held*, That an attachment against the insolvent under the local Statute of Nova Scotia relating to "Absent or Absconding Debtors" duly registered does not bind his lands as against an attachment under the Insolvent Act of Canada subsequently registered, the judgment under the Nova Scotia Statute not having been obtained or registered until after the registry of the attachment under the Insolvent Act.

J. W. Bingay, for the Claimant.

Pelton, Q. C., for the Assignee.

SAVARY, CO. JUDGE. By the "British North America Act," sec. 91, sub-sec. 21, the power of legislation on the subject of Bankruptcy and Insolvency is exclusively assigned to the Dominion Parliament. By sec. 92, sub-sec. 13, authority to legislate respecting property and civil rights generally, exclusively belongs to the Local Legislature. When the Dominion Parliament legislates upon any subject exclusively assigned to it, all local and civil rights must be subordinate, and all civil laws may be over-ridden by it; and so, conversely, when the exclusive right to legislate on any particular subject is conferred on the Local Legislature, such right carries with it a right to deal with matters so far incidental to the subject as to make the regulation of them essential to the completeness and effectiveness of the legislation; and the Local Legislature may therefore make provisions for enforcing and carrying out their enactments, although in doing so, they may similarly invade the domain of the General Parliament as defined by the strict language of sec. 91 of the Act. For instance, it has been laid down that the breach of a Statute is indictable as a misdemeanor at common law: *Russell on Cr. p. 46*. Yet the Local Legislature may impose penalties of fine or imprisonment for a breach of its enactments, so that proceedings to enforce such enactments, may be to all intents and purposes criminal proceedings; yet it would clearly seem that such proceedings ought to be prescribed by the same legislative authority that creates the offence and is alone interested in its punishment. If the Local Legislature can impose a penalty, it ought clearly to and most assuredly does possess the power to define the mode in which and terms on which, that penalty is to be enforced or remitted, as its policy on that particular subject may seem to dictate; and all this although the criminal law including criminal procedure is exclusively assigned to the Dominion Parliament. Were it otherwise the powers assigned to the Local Legislature in police and municipal matters would be illusory, and repressive and prohibitory enactments within their jurisdiction would be at the mercy of hostile or obstructive legislation by the higher Parliament. Thus the Local Legislature in exercising its functions on some subjects would seem to trench on those of the Dominion Parliament respecting criminal law and procedure; and so, but much more clearly, the Dominion Parliament in legislating on Bankruptcy and Insolvency may, in carrying out its policy on these subjects, override any local enactments, and assert its paramount authority throughout the whole field of the law of property and civil rights.

Now it is easily perceived that there may be statutes of either legislature perfectly valid so

## IN RE KILLAM, EX PARTE.

long as they do not chance to conflict in any case with the provisions of a statute of the other legislature within its exclusive authority; but when they do so conflict and only then, the exclusive authority on the particular subject must prevail. Such for example would obviously be Chap. 137 Rev. Stat. 3rd Series. So long as the party seeking the benefit of that chapter has not become insolvent under the Dominion Statute, all the proceedings under it are valid and effectual, for they only relate to property and civil rights; but as soon as the Dominion Statute on insolvency is invoked that chapter has no more force as to him or his case, and the relief it contemplates can only be obtained under the Dominion Statute. He is then in Bankruptcy or Insolvency within the meaning of the British North America Act, and the Insolvent Act of Canada therewith attaches with exclusive authority upon his person and property. When and where that chapter conflicts or operates inconsistently with the Dominion Insolvent Act of 1869 or 1875 it is superseded, and must be treated as repealed by the concluding clause of sec. 164 of the former Act, or 149 of the latter. In any instance where it does not so conflict, and its operation does not become inconsistent with either of those Acts, there is nothing to hinder its provisions being carried out, and *quoad* that case it is, as an act *intra vires*, unrepealed and by the Dominion Parliament unrepealable. Such seems to be the view held in the United States, a country that has like ours a federal constitution and distribution of legislative powers between local and federal legislatures; a view I think that indicates the only principle upon which the different powers of such legislatures can be harmonized. See Bump on the Law & Pr. of Bankruptcy, p. 293-4, where under the title "State Insolvent Laws," referring to Statutes for the relief of insolvents from civil imprisonment, it is said, "The State laws are not entirely abrogated (by the Federal Law). They exist and operate with full vigour until the insolvent law attaches upon the person and property of the debtor." Similarly this Statute of Nova Scotia, cap. 97, relating to absent or absconding debtors (which like cap. 137 and its amendments is not technically an Insolvent Act, although it deals with the case of persons presumed to be grammatically speaking insolvent,) is perfectly effectual and valid, so long as the debtor's property and rights and the relative rights of his creditors have not by proceedings under the Insolvent Act of the Dominion been drawn within the supreme influence and control of that Act. Then, and then only, the provisions of that Act exclusively apply, and those of the local Act are superseded in the particular case. The very fact of absconding is declared to be an act of insolvency; an act which warrants the

creditors if they see fit, in putting the machinery of the Dominion Statute in motion, and getting the full benefit of its provisions. From that moment the debtor's estate is liable to liquidation, and all proceedings taken under any local Statute to prevent it, must give way. The local Act is in the language of the repealing clauses of the Insolvent Act, "inconsistent" with the Statute, in that it gives the first attaching creditor by virtue of the registry of his attachment a lien upon the real estate of the debtor over every incumbrancer; whereas the Dominion Statute acting in accordance with the general principle and object of Bankrupt laws, provides as a result of such an act of insolvency, for a general distribution of assets, real and personal, among all the creditors. Therefore the provisions of Ch. 97, and its corollary, sec. 24 of Ch. 79 (like those of Ch. 137 Rev. Stat. 3rd Series) in so far as they are in this manner inconsistent with the Insolvent Act of Canada, are *pro hac vice*, but only *pro hac vice*, repealed; and such Statutes wherever they are thus inconsistent, if passed after the Insolvent Act of Canada are *pro hac vice*, but only *pro hac vice*, inoperative. I say only *pro hac vice*, because the effect of the repealing clause in the Insolvent Act upon such Statutes, even if expressly named, could only be to render them inoperative as against proceedings under that Act, and as against creditors who, upon the commission of acts of insolvency by the debtor, seek to secure the equitable benefits of that Act. To abrogate them to any further intent, the most express language of repeal in a Dominion Statute would, I apprehend, be *ultra vires*. But if Parliament is within its powers when it says, as it does in section 3 of the Act of 1875, that a "debtor shall be deemed insolvent," if he "absconds" from "any Province with intent to defraud any creditor, or to defeat or delay the remedy of any creditor," and thereupon proceeds to prescribe certain consequences of that absconding in respect to the disposal of his property, and enacts that any local "Act or parts of Acts" which are "inconsistent with the provisions" of that Act are "repealed,"—then surely any local Statutes prescribing a totally opposite mode of dealing with such property are *pro tanto* invalid and nugatory as against any creditors, or the assignee on their behalf claiming the supervision of those consequences.

It must have been upon the ground of the implied repeal, *pro hac vice*, of inconsistent enactments that *Henry v. Douglass*, cited in *Clarke* on the Insolvent Act, p. 249, from the U. C. L. J. N. S., p. 108, was decided. It is stated to have been there held, altogether independently of sect's 59 of the Act of 1869, and 83 of the Act of 1875, avoiding liens on goods and on the proceeds of goods sold under execution,—before those

## IN RE KILLAM, EX PARTE.

clauses in fact became part of the Insolvent Act in force in the old Province of Canada, and while the Act of 1864, which did not contain such provisions, was law,—that a writ of attachment levied upon the insolvent's goods, followed by executions in the Sheriff's hands, was ineffectual to prevent the estate levied on passing wholly to the Assignee. So it seems to have been held by one of the higher Courts of Lower Canada in the case of *Bacon v. Douglas*, 15 L. C. R., p. 156, cited on p. 246, of Clarke. If without such provisions as are contained in sec. 83 a seizure under an execution could not prevail as against the Assignee, upon what principle should a levy under an attachment against an absconding debtor so prevail? The case of *Neal v. Smith*, decided by the learned Chief Justice of Nova Scotia and cited on p. 248 of Clarke and 112 of Edgar and Chrysler, would appear to conflict with the principle of these cases, but in addition to the fact that this seems to be the decision, not of the whole Court, but of a single, although eminent Judge, and therefore not so absolutely binding, it is to be noted that in that case the goods had been actually sold under the attachment, and the proceeds alone were the subject of controversy, bringing it within the case of *Whyte v. Treadwell*, cited on p. 247 of Clarke, from 17 Common Pleas U. C., p. 488. In view of those decisions of the Courts of Upper and Lower Canada, it is likely that the section 59 of the Act of 1869 and 83 of the Act of 1875 were passed with the sole object of avoiding the operation of the principle established in *Whyte v. Treadwell*, by giving the Assignee the right, not only to the goods after levy, but the right to their proceeds when sold until "the payment over to the plaintiff," thus extending instead of limiting his title as previously recognised. Hence, the absence of any reference in those sections to liens by attachments under local civil Statutes, or by their registry, does not affect this case. It were superfluous to specially avoid these liens when the courts had already decided that they must yield to a subsequent attachment in insolvency. It is further to be observed that the Canadian Act of 1864 contained no repealing clause whatever. The Court proceeded upon implication only.

The decision of the Supreme Court delivered by Judge McCully in the case of *Murdoch v. Walsh* referred to on p. 108 of Clarke on the Insolvent Act, and cited to me from the newspaper report, does not apply here. The reasoning of the Bench in that case fully commends itself to my judgment, independently of its binding authority upon an inferior Court. It was the case of a certificate of judgment, which when registered, by virtue of sec. 22, ch. 79, binds the lands "as effectually as a mortgage," and therefore, like a mortgage, can only be set aside as against the assignee

in insolvency when given voluntarily as an undue preference. But undoubtedly the Dominion Parliament might have made such a security null and void if acquired within a period when it would seem to thwart the policy of the Insolvent Act looking to a general distribution of the estate, as the Supreme Court, in effect, intimated in the judgment in *Kinney v. Dudman*, 2 R. & C., p. 19, when they decided that sec. 59 of the Act of 1869 was *intra vires*. That it did not deal with these as it did with certain liens acquired by execution was probably a *casus omnisus*; a judgment registered not binding real estate in the old Province of Canada as here. An attachment, moreover under our Provincial law is a *mere process* only; and under sec. 24 of ch. 79, only binds the lands of the party until thirty days after judgment is obtained in the cause. It may never ripen into a judgment at all, for the suit may be successfully defended. Again, the lien acquired by it may be destroyed by the defendant putting in special bail, and no one can pretend that in the event of such bail being compelled to pay the debt they could have any preferential claim upon the estate. It would be exceedingly inconvenient if a lien of such a vague and uncertain character should bind the land as against the assignee in insolvency; and I hold these local Statutes to be exactly those to which the repealing clauses of the Dominion Act are intended to apply when "all Acts or parts of Acts" "inconsistent" with its provisions are referred to. The language of sec. 22, ch. 79, "as effectually as a mortgage," is not used in connection with the lien acquired by an attachment. The judgment here was not obtained until 5th July, 1877. Therefore, before the 5th August, 1877, the lien created by the attachment ceased. It would have merged in the judgment but for the *prior* issuing and registry of the attachment in insolvency; after which no registry or judgment can bind the property or have any force or effect whatever as against the Assignee.

Therefore, I am clearly of opinion that the levy made on the eleventh day of May, 1876, under the writ of attachment issued by the claimant under the Provincial Statute, and the registry of the copy thereof, and of the appraisalment, do not constitute a lien upon the real estate so levied upon as against the assignee in insolvency, and the said claimant is not entitled to be paid his claim in full. But I think he is entitled to be paid his costs of the attachment *bona fide* incurred under the Provincial Act, but which the subsequent proceedings in insolvency under the higher authority of the Dominion Statute have, in my opinion, superseded.—*Digby Courier*.

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### QUEEN'S BENCH.

IN BANCO.

DENISON V. SMITH.

*Insolvency—Transfer of Stock.*

The defendant was, by their Act of incorporation, named as one of the provisional directors of the Toronto, Grey & Bruce Railway Company. and was afterwards elected and acted as a director thereof, having subscribed for \$1000 stock therein, on which he paid partly in money and partly by certain allowances made for his services as such director and otherwise, the sum of \$400. Subsequently to this defendant made an assignment under the Insolvent Act of 1869. Before doing so, however, he had procured the execution by the required majority of his creditors of a deed of composition and discharge, apparently under sec. 94 of the Act in question.

The plaintiff, as a *ft. fa.* creditor of the same company, sued out a writ of *sci. fa.* against the defendant to compel payment to him of the balance due upon the said stock.

The defendant pleaded that he was not a shareholder in the said company, his contention being that the property in the said stock had passed to the assignee. It did not appear whether or not the assignee had accepted or rejected this stock, or had done any act other than accepted the assignment made to him. The defendant had obtained his discharge in the usual way, the unpaid balance on the stock, however, not having been scheduled as a liability of the defendant, and no claim having been proved in respect of it.

*Held*, that plaintiff was entitled to recover, and that the property in the said stock had not passed to the assignee.

*Rule discharged.*

Kennedy, for the plaintiff.

Ferguson, Q.C., contra.

CAMERON V. GILCHRIST ET AL.

*Dower—Action against three defendants—Claim of damages against one—Averment of seisin—Pleading.*

To a declaration in dower against three defendants, and suggesting that while one defend-

ant had not, another had appeared, acknowledging the tenancy of the freehold and consenting to the demandant having judgment, and going on to declare against the third defendant claiming damages for detention of dower, the third defendant demurred, on the ground that as the action was against three defendants, the plaintiff could not recover damages for detention of dower against him alone.

*Held*, affirming the judgment of Gwynne, J., that the declaration was good, and that the objection was not the subject of demurrer, but, if a good objection, only a ground for moving to set aside the declaration for irregularity.

*Held*, also, that it was not necessary to allege that the demandant's husband had died seised of the land.

*Judgment for demandant.*

Bethune, Q.C., for defendant.

Hector Cameron, Q.C., contra.

### COMMON PLEAS.

IN BANCO—SEPTEMBER 5.

FIELDS V. RUTHERFORD.

*Surgeon—Malpractice—Evidence—Non-suit.*

In an action against a surgeon for malpractice the evidence shewed that, though some of the medical men called for the plaintiff stated that they would have pursued a different treatment, the treatment was such as would have been pursued by medical men of competent skill and of good standing in the profession.

*Held*, that there was no evidence of malpractice to go to the jury, and a non-suit was entered.

M. C. Cameron, Q.C., for the plaintiff.

Robinson, Q.C., for the defendant.

PARSONS V. VICTORIA MUTUAL INSURANCE COMPANY.

*Insurance—Paid agreement for—Interim Receipts—Warehouse receipts—Insurable interest—Wool—Prior Insurance.*

The plaintiff, a hardware merchant, as also a large wool buyer, discounted paper at a bank for his wool purchases on the security of warehouse receipts therefor. At the same time he signed and handed to the defendants' local agent, who was also the bank agent, applications for insurances on the wool, the insurance to be held by the bank as further security. The application stated that the insurance was on the usual terms, and conditions of the company. One of the con-

C. P.]

NOTES OF CASES.

[C. P.]

ditions of defendants' policies provided that no receipt or acknowledgment of insurance should be binding unless made by or on one of defendants' printed forms, and signed by their authorized agent. When the application was made the agent did not fill in and sign the defendants' printed form of interim receipts, nor did he sign a written receipt or contract of any kind, stating that he was too busy then to do so, but subsequently, and after the goods had been destroyed by fire, he wrote out a receipt, copying an old printed form. In an action on equitable grounds, setting up an insurance by interim receipt.

*Held*, that the cause of action was not proved.

*Held*, also, that a plea denying the insured's interest in the goods is not proved, by means of the goods having been transferred by warehouse receipts to a bank as collateral security on discounts, for that the insured had still an insurable interest in the wool.

An insurance was effected on large quantities of wool purchased during the wool season, and kept separate from plaintiff's other stock in a warehouse called the wool-house. A prior insurance, in another company, was on a general stock of goods, including wool, which meant small quantities purchased out of the wool season, and stored in a distinct storehouse from the wool-house.

*Held*, that this could not be deemed to cover wool purchased during the wool season.

*Ferguson*, Q. C., for the plaintiff.

*M. C. Cameron*, Q. C., and *J. T. Small* for the defendants.

RE MINISTER OF EDUCATION AND THE PUBLIC SCHOOL BOARD OF MACAULAY, AND PUBLIC SCHOOL BOARD OF BRACEBRIDGE.

*Public Schools—Township By-law for forming Public School Board—Effect on portion of Township united to a Village—Two-thirds majority.*

On 1st January, 1875, Bracebridge, which had hitherto formed part of the township of Macaulay was incorporated as a village. At the time of incorporation Bracebridge and a portion of the township formed a school section, known as section No. 1, Macaulay, which, on the incorporation became the Bracebridge section, the school-house being in Bracebridge. In October, 1875, the township of Macaulay, on a petition of two-thirds majority of the township sections, not counting the portion attached to Bracebridge, passed a by-law under sec. 48 of 37 Vic. ch. 28. O., to abolish the division of the township into school sections, and to form a Public School Board for the township. In November, 1876, a meeting of the County Inspector and the Reeves of Bracebridge and Macaulay with a representation from each School Board was held at Bracebridge for the purpose

of altering the boundaries of the Bracebridge section, when a portion of the territory in dispute was set off to Macaulay and the other portion retained by Bracebridge.

*Held*, on a case submitted by the Minister of Education, that after the passing of the township by-law, the portion of Macaulay which had been united to Bracebridge became detached therefrom, and came under the control of the Township School Board, and continued under such control, notwithstanding what took place in November, 1876; at all events, under the Act of 1877, sec. 6, sub-sec. 7, it clearly became so detached on the 1st January, 1878.

*Held* also, that the portion of the township which had been attached to Bracebridge was not necessary to be reckoned in ascertaining the above two-thirds majority.

*T. G. Scott*, Q. C., for the Minister of Education.

*Bethune*, Q. C., for the Village of Bracebridge.

*McCarthy*, Q. C., for the township of Macaulay.

IN RE MCARTHUR AND TOWNSHIP OF SOUTHWOLD.

*By-law—Closing up road—Ingress and Egress—Compensation.*

Where a by-law was passed by a township corporation for closing up a public road, whereby the plaintiff was excluded from ingress and egress to and from his land which abutted thereon, and did not provide any compensation to the plaintiff.

*Held*, that the by-law must be quashed.

*Hodgins*, Q. C., for the plaintiff.

*Street* (London) for the defendants.

PETROLIA CRUDE OIL COMPANY V. ENGLEHART.

*Agreement—Reformation—Evidence.*

This was an action against defendant for breach of a covenant made by him with the plaintiffs, on consideration of the premises not to use crude petroleum oil in Canada; and claiming \$29,000 agreed upon as liquidated damages for a breach thereof. The defendant set up an equitable defence that his covenant was conditional on certain arrangements making between the plaintiffs and a company called the London Oil Refining Company being renewed: that such arrangement had terminated, and that the breaches complained of were after such termination; and that such stipulations or conditions had been omitted from the deed of covenant without defendant's knowledge or consent, and praying a reformation of its covenant.

*Held*, on the facts and documents in the case that the plea was proved; and that the deed

C. P.]

NOTES OF CASES.

[C. P.]

must be read as containing such stipulations or a reformation if necessary, made therein.

*Robinson, Q.C.*, for the plaintiffs.

*J. K. Kerr, Q.C.*, for the defendants.

WRIGHT V. SUN MUTUAL LIFE INS. CO.

WRIGHT V. LONDON LIFE INS. CO.

*Insurance—Seals—Equitable Replication—Reformation—Estoppel—Suicide—Exposure to obvious danger—Nature of accident—Evidence.*

The Acts of incorporation of the Sun Mutual and London Life Insurance Companies required their policies to be under seal. The policies issued by the above companies were on the printed forms of policies issued respectively by these companies, and which they had been accustomed to and had been using for some time previously, and which were signed and countersigned as required by the Acts, but were not under the corporate seals of the companies, but in the attestation clause in the Sun company, though not in the London company, the policy purported to be so sealed. To the claims on their policies the defendants pleaded respectively non est factum, and that defendants did not insure or promise, &c.

The Court under the circumstances of the cases directed equitable replications to be added, setting up the facts entitling the plaintiff to equitable relief; and either for a reformation of the policies by the addition of the companies' seals, or that they should be debarred from setting up such defence.

The defendants also set up as grounds of defence, that the death of the insured was occasioned by suicide, or by exposure to obvious or unnecessary danger by walking on a railway track, or that the manner of death was unknown or incapable of direct or positive proof, which under the terms of the policy avoided defendants' liabilities.

*Held*, that the defence of suicide or exposure was not established; and the cause of death sufficiently appeared.

*M. C. Cameron, Q.C.*, for the plaintiff.

*Bethune, Q.C.*, for the defendants.

O'CONNOR V. McNAMER.

*Bill of costs—Action on—Agreement not to exceed fixed amount—New trial.*

In this case, which was an action on a bill of costs, the question was whether an agreement had been made by an attorney that the costs of certain chancery proceedings should not exceed a certain amount which had been paid. The jury found the agreement to have been made, and entered a verdict for the defendant. A new trial was moved on the ground that a discussion

which had been allowed to take place at the trial as to the magnitude of the bill had influenced the jury in their finding.

The court refused to interfere, Gwynne, J., doubting that the discussion had not the effect contended for, the jury having been expressly told that the fact of the making of the agreement was the only question for their decision.

*Ferguson, Q.C.*, and *T. Arnoldi* for the plaintiff.

*Monkman* for the defendant.

## CHANCERY.

The Chancellor.]

[Sept. 4th.

CURRY V. CURRY.

*Statute of Frauds—Parol Evidence.*

The father of the plaintiffs and the defendant were brothers, and the defendant obtained a deed in his own name of 100 acres of land. It was shown distinctly that the defendant had at one time made a deed to his brother of some land, although the defendant, after his brother's death, denied having given any deed, but on the hearing he admitted giving a deed of an adjoining property for which no patent had issued, although the defendant's name had been entered in the books of the Crown Lands Department as an applicant for purchase. It was shown that a box containing the deeds in reference to the property had been stolen, and the deeds had never been seen since. The Court, under the circumstances, notwithstanding the denial of the defendant, held that the plaintiffs were entitled to an account of the purchase money received by the defendant upon a sale of the property, and ordered the defendant to pay the costs to the hearing.

The Chancellor.]

[Sept. 4th.

FORRESTER V. CAMPBELL.

*Mortgages.*

The plaintiff was the holder of two mortgages, and in June, 1870, obtained a decree of foreclosure, whereby he was declared entitled to priority over one F., who was the holder of a fourth mortgage thereon, and after the decree the plaintiff bought up the third mortgage, which was, prior to that, held by F.; and he had also, before the date of the decree, procured from the mortgagor a release of the equity of redemption.

*Held*, on appeal from the Master, following the decisions of *Barker v. Eccles*, 18 Gr. 440—523, and *Hart v. McQueen*, 22 Gr. 133, that the Master had correctly found the plaintiff entitled to priority over F. in respect of all the three mortgages.



C. P.]

NOTES OF CASES.

[C. P.]

The Chancellor.]

[Sept. 4th.]

CAMPBELL v. CHAPMAN.

*Fraudulent Conveyance.*

A man who had been carrying on business in partnership agreed to buy out the interest of his co-partner, for the purpose of continuing the business on his own account, and subsequently made a purchase of property and took the conveyances thereof in the name of his wife, the husband swearing that at that time he did not owe a dollar, and that the money expended in the purchase of the property belonged to his wife, having been obtained on the sale of lands belonging to her. This statement, however, was shown to be incorrect; and a judgment having been recovered against the husband, upon which nothing could be realized under execution, the Court, on a bill filed by the judgment creditor, following the decision in *Buckland v. Rose*, 7 Gr. 440, declared the transaction fraudulent as against creditors, and ordered a sale of the lands in the usual manner, and payment of the proceeds to creditors.

The Chancellor.]

[Sept. 4th.]

SMITH v. McLANDRESS.

*Sale for taxes—Registration.*

One H., being indebted to a bank, mortgaged his lands thereto as security for his indebtedness, and the bank subsequently foreclosed his interest, but still continued to allow H. to negotiate the sales of the lands and consulted him respecting sales effected by the bank. Some of the lands were specifically given as a security of a certain indorser, and the notes upon which his name appeared had all been retired. One of the lots so mortgaged was afterwards sold for taxes, but the purchaser omitted to register his deed for more than eighteen months after the sale: Meanwhile H., the mortgagor, sold and conveyed the land to a *bona fide* purchaser, without notice, which sale was subsequently ratified and confirmed by the bank, and the conveyances duly registered, before the purchaser at the tax sale registered his deed.

*Held*, that the purchaser at the tax sale had thus lost his priority; and a bill filed by him impeaching the sale by the mortgagor was dismissed with costs.

The Chancellor.]

[Sept. 4th.]

MUNRO v. SMART.

*Married Women—Wills Act.*

*Quære*, whether a married woman, under the *Revis. St. O.* ch. 106, s. 6, can devise or bequeath her separate property to one of several children to the exclusion of the others.

The Chancellor, in disposing of a case in which this point was raised, remarked upon the words of the Act devise or bequeath "to or among her

child or children, issue of any marriage" that "the language is not very clear, it may be read to her child or among her children, or to her child or children or among her children. Either way it seems to be implied, where the word child is used, that it is an only child; it is not a child or children issue of any marriage, but to her child I do not think the point by any means clear.

Full Court.]

[Sept. 5th.]

ST. MICHAEL'S COLLEGE v. MERRICK.

*Fraudulent Assignment—Pleading.*

*Held*, affirming the judgment of Blake, V. C., that the plaintiffs were not at liberty to rely on a judgment at law recovered since the filing of the bill, for the purpose of setting aside an assignment of a claim as fraudulent, but must stand on their position as creditors when the proceedings were instituted in this court.

*Held* also, that the debt alleged in the bill being under a bond to Merrick's wife and not to Merrick himself, was not such a claim as could be garnished under the C. L. P. Act.

The CHANCELLOR, in disposing of the case, observed, "It is to be regretted that such a case of fraud as is disclosed in this bill, cannot, from the terms of the Common Law Procedure Act, as interpreted in the cases of *Gilbert v. Jarvis* and *Horsley v. Cox*, be reached in this Court. It may be that the case is incapable of being established in evidence, but as the law stands, were it established ever so clearly, the creditor is without remedy.

Full Court.]

[Sept. 5th.]

MEIGHEN v. BUELL.

*Trustee—Solicitor—Costs.*

On re-hearing the order as reported 24 Grant, 503, disallowing to a solicitor trustee costs other than costs out of pocket in suits to which he was a party was reversed [SPRAGGE, C., *dubitante*, who thought that that rule should be applied to all suits brought by solicitor trustees, and to all costs in those suits.]

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## U. S. REPORTS.

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### SUPREME COURT OF RHODE ISLAND.

WAKEFIELD v. NEWELL, Town Treasurer, &amp;c.

*Liability of Municipality for injury by surface water from streets.*

No action lies against a municipal corporation for allowing the ordinary and natural flow of surface water to escape from a highway on to adjacent land. Nor will an action lie for the results of such usual changes of

## WAKEFIELD V. NEWELL.

grade as must be presumed to have been contemplated and paid for at the lay out of the highway.

A municipal corporation has the same powers over its highways in respect to surface water as an individual has over his land. *Inman v. Tripp*, 11 R. I. 520, explained and affirmed.

[February 23, 1878.

Trespass on the case. Demurrer to the declaration.

*Beach & Osfield* and *Stephen A. Cooke, Jr.*, for plaintiff.

*Pardon E. Tillinghast* for defendant.

DURFEE, C. J.—This is an action on the case to recover damages from the Town of Pawtucket, for suffering water to flow from a highway in the town upon adjoining land belonging to the plaintiff. The declaration sets forth:—

"The plaintiff was and still is the owner in his own right of certain real estate, situate in said town, on and adjoining a certain street and public highway in said town, called Pleasant street, and which street said town were bound to keep in good and suitable repair, for travelling in and upon the same, and to keep certain gutters and sluiceways running in and along said highway, so and in such good repair that the water that usually and of right should run therein should not overflow and run out and upon the said land of the said plaintiff; but the said town, by themselves, their officers, agents, and employees, so negligently and wrongfully kept the said street and public highway, and the sluiceways thereof in such bad repair, that the water which they ought and should have carried in and along said street overflowed on and over the land of the plaintiff, so that the said land was by said water overflowing thereon greatly damaged, and the crops growing thereon were greatly injured," &c.

The defendant demurs to the declaration upon the ground that it does not properly set forth any cause of action. The plaintiff relies in support of the action upon *Inman v. Tripp*, 11 R. I. 520. In that case the plaintiff owned an estate in the city of Providence, on Public street, at the lowest point thereof, and the city so changed the grade of several streets as to allow surface water which formerly flowed in other streets, and surface water which was formerly ponded in another street at some distance from the plaintiff's estate, to run down Public street, and thence on to his estate and into his cellar and well, and the court held that the plaintiff was entitled to an action

against the city for the injury. The declaration in the case at bar does not show any such case. It merely shows that water escaping from the highway upon the plaintiff's land injured it, and the crops growing upon it. It is true the declaration alleges that the water ought to have been kept or carried by the town in the gutters or sluiceways of the street. The question of duty, however, is a question of law, and the defendant is entitled to have the facts alleged on which the duty is predicated. For anything that appears, the injury to the plaintiff was the result of the ordinary and natural flow of the surface water, which the defendant would be under no obligation to confine in gutters or sluiceways for the plaintiff's protection, or of such changes near at hand as are usually made, and must, therefore, be presumed to have been contemplated, and paid for in the lay out. *Flagg v. City of Worcester*, 13 Gray, 601. In *Inman v. Tripp*, 11 R. I. 520, we did not mean to decide that a town or city has any less power over its streets or highways, in respect of surface water, than an individual has over his own land, but only that it has no greater power; or, in other words, that it is liable for discharging the surface water accumulating in its streets and highways, to the same or very much the same extent, as an individual is liable for discharging such water from his own upon his neighbour's land. If this action were against an individual instead of a town, we do not think the declaration, similar in form, would be sufficient; for mere neglect by an individual to retain on his own land water which, falling there, would naturally flow on to his neighbour's land, is no cause of action, unless he first accumulates it by artificial means so as considerably to increase the volume and detrimental effect with which it would flow on his neighbour's land. *Pettigrew v. Evansville*, 25 Wis. 223, 229; *Livingston v. McDonald*, 21 Iowa, 160; *Gannon v. Hargadon*, 10 Allen, 106; *Butler v. Peck*, 16 Ohio St. 334; *Goodale v. Tuttle*, 29 N. Y. 459, 467; *Washburn on Easements, &c.*, 450 *seq.*

We think, therefore, that as the declaration now stands, the demurrer must be sustained.

*Demurrer sustained.*

—*Albany Law Journal.*

## COLBURN ET AL., V. MAYOR OF CHATTANOOGA.

## SUPREME COURT OF TENNESSEE.

## COLBURN ET AL. V. MAYOR OF CHATTANOOGA.

*Municipal Law.*

Where the authorities of a municipal corporation are proceeding to do an act which is *ultra vires* and which will impose on a taxpayer an unlawful increase of tax, he may file a bill in equity, in his own name, to enjoin the act. The concurrence of the Attorney-General, or other representative of the public, is not indispensable.

In such a case a Court of Equity has power to enjoin the issue of illegal evidences of debt by the corporate officers.

Corporate powers are to be strictly construed, and unless clearly given in the charter or by statute, no authority exists in a municipal corporation to issue scrip or warrants on the treasurer, in the form of promises to pay at a future day, for the purpose of paying the ordinary expenses of the municipality.

This was a bill filed by complainants in behalf of themselves and other taxpayers of the City of Chattanooga, to enjoin the mayor and aldermen from issuing any scrip, treasury warrants, currency note, bill or other evidence of debt, until legal authority should be first obtained for so doing.

The bill alleged that by an Act of the General Assembly of March 20th, 1873, entitled "An Act to provide for the issuance of bonds by the cities," it is provided that in no case shall the authorities of cities, having more than eight thousand and less than twenty thousand inhabitants, issue bonds or other evidences of debt until authorized by a two-thirds vote of the qualified voters of such city, at an election held for that purpose; and when duly authorized so to do, by an election held as aforesaid, such authorities are empowered to issue bonds or evidences of debt not exceeding \$100,000 in addition to the debts outstanding at the time of the passage of said Act; that in violation of the said Act the defendants were issuing evidences of debt, consisting of warrants on the treasurer, drawn by the mayor and countersigned by the recorder, currency warrants, due in one and three years, which are promissory notes, having the form and general appearance of bank bills; that the treasury warrants are payable in city scrip; that by this creation of debts the defendant has greatly depreciated the credit of the city, &c., and praying that defendants be required to state the amount of such evidences of debt issued, &c., and be enjoined from further issue without lawful authority.

The defendants, after a motion to dismiss for want of jurisdiction of subject matter and parties, which was overruled by the Court, answered, stating the amount of the city debt; the amount of scrip issued; that they had issued the scrip under the authority of and for the purpose speci-

fied in the municipal charter, and to accomplish the objects of their incorporation, and for providing for the payment of the debts and expenses of the city; that upon the coming into office of the present board, they found no money in the treasury and a large outstanding indebtedness, and being deprived by the action of the General Assembly of the State, of the power to enforce the collection of taxes for the years 1874-75, they issued warrants and scrip, believing such a course to be necessary to the maintenance of the city government, and for the best interests of the people; that they have the right to issue warrants upon their treasury, whether they have money therein or not, and the right to issue scrip, and that the credit of the city is depreciated, not by any illegal creation of debt, but by the action of the Legislature suspending the collection of taxes.

The form of the scrip issued was as follows:—

"State of Tennessee [1].

One year after date the Board of Mayor and Aldermen of the city of Chattanooga will pay one dollar to bearer.

THOMAS TAYLOR, Mayor.

"———, Auditor."

And endorsed: "This note is receivable for all taxes and other dues of the city on presentation."

The cause was heard upon the bill, answer and exhibits, and an injunction granted, and defendants appealed to this court.

The opinion of the Court was delivered by

LEA, Special J.—The first question presented by the case for our determination is, had the Chancery Court jurisdiction of the subject and of the municipal conduct of the defendant by bill filed by a taxpayer? It is insisted for the defendants that illegal acts, such as defendants are charged with, affect the whole public, and the public must, by its authorized officers, institute the proceeding to prevent or redress the illegal act, and that therefore the Attorney-General was the proper person to file this bill; and we are referred to the reports of several States thus holding. The better and more universal doctrine is that any taxpayer may bring his bill in equity to prevent the corporate authorities from acting *ultra vires*, where the effect will be to impose on him an unlawful tax, or to increase his burden of taxation: 2 Dillon on Mun. Corp. sect. 731, says: "In this country the right of *property holders or taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties in any mode which will injuriously affect the taxpayers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

corporate body, or levying and collecting void and illegal taxes and assessments upon real property \* \* \* has been affirmed or recognised in numerous cases in many of the States. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct and adequate preventive relief against their abuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names, than to compel them to rely upon the actions of a distant State officer."

The action of the Chancellor, therefore, in overruling the motion to dismiss the bill for want of jurisdiction was proper. The charter of the City of Chattanooga provides that the corporation "shall have full power to borrow money on its bonds for any object that its authorities may determine to be important for the promotion of its welfare, and is not made improper by existing law, provided that the sum borrowed under the provisions of this section shall not exceed the sum of \$50,000, without being specially authorized to do so by a majority of the qualified votes of said city."

The unconstitutionality of the Act of March 20th, 1873, has been argued with great earnestness, because the caption of the Act does not state the subject of the Act, and because it repeats the section just quoted from the charter of incorporation of the City of Chattanooga. In the view we have taken of this case, it is immaterial whether said act is constitutional or unconstitutional, or whether it repeats any part of the charter or not. Neither by the Act of March 20th, 1873, nor by the charter has the corporation any power to issue warrants on the treasurer, or city scrip, for the purpose of raising money for the ordinary expenses of the corporation. Warrants on the treasurer may be given by an authorized officer to pay money, but only as evidences to him that the debts had been audited by the properly authorized officers of the body, and serve as vouchers to him for his disbursements: *Mayor and Council of Nashville v. Fisher et al.*, Supreme Court of Tennessee, not yet reported. If there be not money in the treasury, then the corporation should borrow, as provided in the charter or by existing law, or they should levy and collect such tax as to raise whatever sum is needed, and if they can neither borrow nor raise the money by taxation to meet their expenditures, then they should cease their expenditure until they can thus realize according to law.

But for no purpose had the corporate authorities the right to issue warrants on the treasury payable in city scrip, or to issue the city scrip. Their action was illegal and contrary to law and public policy. This city scrip is about the size,

and upon the same kind of paper, and in every respect very much like national bank notes, and was doubtless designed to circulate as currency.

The Court will strictly construe municipal charters, and require clear authority for the powers assumed to be exercised under them. While these defendants aver that they have acted in the utmost good faith, yet so much abuse of power, not to say corruption, has been found in some municipalities, and such onerous and ruinous burdens placed upon the taxpayers, that to use the language of a distinguished author, "it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard."

Let the decree be modified as indicated in this opinion, and the injunction be made perpetual.—*American Law Register.*

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

## INTERMEDIATE EXAMINATIONS: EASTER TERM, 1878.

*Equity.*

1. A promissory note made by A payable ✓ to B or order is endorsed by B for A's accommodation, whereupon A negotiates the note, and before its maturity B purchases it at less than its face amount, and upon its maturity calls on A for payment. What amount is B entitled to recover from A? Explain the principle.

2. A demises a house to B for five years at an annual rent. B in the lease covenants to pay this rent, and at the expiration of the term to deliver up the premises in good repair. During the first year of the term the house is absolutely destroyed by fire, the result of accident. Is B obliged to pay any, and if so, what rent, or to rebuild? Give reasons for your answer in each case. ✓

3. A, the owner of a freehold estate, contracted with B, whereby B becomes entitled at any time within five years to purchase or not to purchase this estate, as he alone should determine. A dies within the five ✓ years, and before B has elected, and thereafter B within the five years elects to purchase the land. Are the heirs or next of kin of A entitled to this purchase money? Give your reasons.

4. What jurisdiction has our Court of Chancery to grant relief in a suit which could have been brought at law, and in which, if so brought, full and adequate relief would have been given? ✓

5. To what extent will this Court decree

## EXAMINATION QUESTIONS.

an account at the instance of one partner as against his co-partner, the partnership still subsisting, and no dissolution being asked or ordered?

6. What obligation, if any, is there upon a mortgagee in possession to keep the mortgaged premises in repair?

✓ 7. What is the reason for the rule that equity will not marshal assets in favour of a legacy given to charities?

## BROOM'S COMMON LAW AND A. J. ACTS.

1. What is meant by the expression *damnum sine injuria*? Is such damage actionable by law? Explain.

2. What is an action of Trover? What are the two things necessary to be proved to entitle plaintiff to recover in this kind of action?

3. Under what circumstances, if any, is a private person justified in abating a public nuisance?

4. What is the effect of a drawee of a bill of exchange accepting the bill (a) generally; (b) payable at a bank; (c) payable at a bank and not otherwise or elsewhere;

5. Define an *estoppel in pais*.

6. What are the various degrees of homicide recognised by the law of England? Give examples of each.

7. What provisions are made by the Administration of Justice Act for the trial of common law cases without a jury besides trial at *Nisi Prius*?

## LAW SCHOOL.

## Equity.

✓ 1. State the order in which partnership assets are administered.

2. What interests have the legal representatives of a deceased partner in the goods and chattels of the partnership?

3. How has the doctrine of liability to third persons, by reason of a party sharing in the profits, been settled by the case of *Cox v. Hickman*.

4. A partner purports to mortgage, for his separate benefit, his interest in certain partnership lands. What does the mortgagee take under this mortgage?

5. What effect (if any) on the partnership relation has the lunacy of one partner?

6. To what extent has a partner a lien on the partnership property?

7. State under what circumstances the Court will grant relief to one partner as against his co-partner in respect of partner-

ship matters without decreeing a dissolution.

8. When does the Statute of Limitations begin to run in favour of one partner as against his co-partner in respect to partnership rights?

9. A, having given his personal continuing guarantee to a firm, securing them against loss by reason of any credit they might give to B. A new credit is so given, and an additional partner is admitted into the firm, and thereafter further credit is given to B. on the security of this guarantee. What is the extent of A's liability?

10. Point out some distinctions between the rights of partners in partnership lands and of co-owners in lands owned by them in common.

11. What effect, if any, on the partnership has the sale under execution of one partner's whole interest in the partnership? Explain.

12. Trace the changes in the practice whereby a partner's interest in partnership chattels could be realized for the benefit of his separate creditor.

13. What prudential steps should a partner adopt on a dissolution of partnership in order that his co-partner may not thereafter render him liable on new contracts?

14. How can a creditor of a firm obtain relief against the separate estate of a deceased partner? Who are necessary parties to such procedure?

15. A deceased partner, by his will directed his executors to carry on the partnership business. To what extent are the executors entitled to embark the deceased partner's property in such business?

## JUNIOR CLASS.

*Witnesses and Evidence in Criminal Cases.*

1. What was the common law rule as to the admissibility in evidence of convicted felons? and what statutory change has been made in this respect?

2. Is a criminal under sentence of death admissible to give evidence now, or formerly? Give reasons.

3. Discuss the question of the admissibility and effect of the evidence of an accomplice in a criminal case.

4. State briefly the rule, giving exceptions, as to the admissibility of the evidence of a wife for and against her husband in criminal law. A and B are jointly indicted, can the wife of A be called in evidence for or against B?

## CORRESPONDENCE.

5. Distinguish between *privilege* and *incompetency* of witnesses, giving examples of each, arising out of the relation of husband and wife.

6. In how far is evidence of the so called second wife admissible in bigamy cases?

7. How is the question of admissibility of the evidence of a witness objected to on the ground of lunacy usually determined?

8. What are the facts relied on for the purpose of deciding whether or not an infant of tender years is admissible as a witness? Trace briefly the history of the changes in our law in this respect.

9. In how far is a solicitor privileged from giving evidence in regard to confidential communications between his client and himself.

10. State briefly the chief facts on which the credibility of a witness depends.

11. In how far may the credibility of a witness be attacked by the party calling him?

12. Discuss fully the question as to whether a defendant may be convicted of perjury on the evidence of one witness.

13. What methods, statutory or otherwise, are provided for enforcing the attendance of witnesses in criminal cases?

14. Give exceptions to the rule that counsel is not allowed to put leading questions to a witness called by himself.

15. Give cases in which burden of proof is on the defendant in criminal cases.

## CORRESPONDENCE.

*Precedents.*

To the Editor of CANADA LAW JOURNAL.

SIR,—Among the recent decisions noticed by you in your number for August is the judgment of the Queen's Bench in *McEdwards v. McLean*, in which it was held that the Insolvent Act does not take away the landlord's right to distrain for rent. The opposite was decided by Mr. Justice Gwynne after an exhaustive review of the law in *Munro v. Commercial Building and Savings Society*, 36 Q. B., U. C. 464. This decision is not even referred to in the judgment of the Court in *McEdwards v. McLean*, and it is fair to assume that the Court would have

felt bound to follow it had their attention been directed to the report, especially as Mr. Justice Armour appears to have been keenly alive to the injustice that must result from the law as he lays it down, the blame for which he considers attaches to the Legislature. It is most unfortunate that there should be this conflict of judicial authority on so important a point.

Again, in reporting *Ontario Bank v. Wilcox*, you give the same Court credit for deciding "(3) a chattel mortgage valid between the parties at common law is valid against Assignee in insolvency." In *Re Andrews*, 2 Appeal Reports, 24, the Court of Appeal (Patterson, J. A., and Moss, C. J.) decided, after a review of the cases, that "under section 39 of the Insolvent Act of 1875, the Assignee represents the creditor for the purpose of avoiding a mortgage for want of compliance with the Chattel Mortgage Act." Does the Court below refuse to follow this decision, or was it overlooked by the eminent counsel who argued the case? Does the Court of Queen's Bench wish it understood that it is not governed by that "slavish adherence to precedent" for which Courts are so often blamed? If so it would be well to bear in mind that if there is anything worse than a bad law it is an uncertain one.

Yours &c.,

W.

Toronto, August, 1878.

## REVIEWS.

SHORT STUDIES OF GREAT LAWYERS.  
By Irving Browne. Published by the Albany Law Journal—Weed, Parsons & Co., Albany, U. S.

A reviewer hardly knows after reading the preface why this little book is sent for review. The author very cleverly anticipates many things we might probably

## FLOTSAM AND JETSAM.

have said if he had not said them for us. We will wonder, he says, why he left out this man and put in that man and so on, whilst, last of all, one censor will, he adds, be found who will wonder why he wrote it at all. The writer gives his answer with infantile simplicity and confiding helplessness saying, "I am sure, I don't know, I promise never to do so again." We trust he may break that promise, in some sort at least, for a pleasanter bit of reading of its kind during a few of the dog days could not be found. The stories he tells are not altogether new, in fact many of them rather the reverse, but there is a refreshing crispness in the way of telling them which is all his own. The articles originally appeared in the *Albany Law Journal*.

A PRACTICAL TREATISE ON THE OFFICE AND DUTIES OF CORONERS IN ONTARIO, WITH AN APPENDIX OF FORMS. 2nd Edition. By W. F. A. Boys, LL.B., of Osgoode Hall, Barrister at Law, Toronto. Hart & Rawlinson, 1878.

The first edition of this very useful little book was published in 1864. The present is more complete. The principal addition is a chapter on antidotes, which doubtless, will be useful to those Coroners who are not medical men, as most of them are at present. Whether or not it is wise to entrust duties, which are mainly of a judicial character, and which require for their proper discharge a legal training and some knowledge of the law of evidence, to medical men is a question of some importance, and has heretofore been discussed in these pages. Mr. Boys gives information for both classes, and a careful reading of this book would lessen the number of "good things" we see occasionally in the public prints touching many of those who belong to this venerable body.

We recently came across in that repertoire of light legal literature, the *Albany Law Journal*, a reference to a case reported in Plowden, in the time of Queen Elizabeth, which we shall cite for the benefit of those interested in "Crown's Quest Law." Sir James Hales committed suicide by throwing himself into a water course. The Coroner having

duly sat upon him, presented that, "passing thro' ways and streets of the said City of Canterbury, he the said James Hales did voluntarily enter the same and did himself therein voluntarily and feloniously drown." Suicide being a felony, his estates were in consequence forfeited. But it was pleaded that Sir James did not commit suicide; he only threw himself into the water, and suicide, implying death, as he did not die during his life he did not commit suicide. Then did Sir James commit suicide during his life? He only threw himself into the water in his lifetime, but that was no felony, and the suicide not being complete until his death—and he did not die during his life—he therefore had not, it was argued, committed felony. This question might be a standing one for discussion when the time arrives for competitive examinations for would-be coroners.

## FLOTSAM AND JETSAM.

Judge Freedman, in charging the jury in a case tried last week in the New York Superior Court, made some pertinent remarks upon the interesting subject of the value of a lawyer's services. Litigants, and those who have occasion to apply to the profession for service or advice, are too apt to estimate the worth of what is done for them by the time occupied in doing it, and, therefore, are very much dissatisfied, when a charge of a considerable amount is made for what apparently occupied only a few hours or a few days of the counsel's time. But as Judge Freedman says:

"To become proficient in the necessary knowledge relating to all these matters involves years of self-denial, close application and devotion, and a study of almost a lifetime. A lawyer's compensation is, therefore, not to be measured merely by the time he actually spends in the discharge of his duties. An advice given in a short interval, but founded upon years of previous acquaintance with the question involved, may, in an important case involving large interests, be worth quite a sum of money."

The popular feeling in reference to lawyer's charges is, however, to some extent encouraged by the action of certain members of the bar who, to secure business, underbid their brethren, and certain others who habitually make no charge for advice even to those able and willing to pay.—*Albany Law Journal*.

## LAW SOCIETY, EASTER TERM.



## Law Society of Upper Canada.

OSGOODE HALL,

EASTER TERM, 41st VICTORIA.

During this Term, the following gentlemen were called to the Bar; the names are given in the order of merit:—

THOMAS GRAVES MEREDITH.  
 THOMAS PERCIVAL GALT.  
 OLIVER R. MACKLEM.  
 DONALD MALCOLM CHRISTIE.  
 TREVELYAN RIDOUT.  
 DAVID BURKE SIMPSON.  
 PETER JAMES MILLS ANDERSON.  
 JOHN AUSTIN WORRELL.  
 GEORGE WASHINGTON WELLS.  
 JAMES CRAIG.  
 JOHN NICHOLLS.  
 WILLIAM GEORGE MURDOCK.  
 ALFRED McDougall.  
 HENRY RYERSON HARDY.  
 FREDERICK VAN NORMAN.

The following gentlemen, members of the English Bar, were called to the Bar of this Province:

AUGUSTUS HENRY FRAZER LEFROY.  
 THEODORE KING.

And the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:—

*Graduates.*

ALEXANDER DOWNIE CRUICKSHANK.  
 JOHN HERALD.  
 JAMES HENRY BALLAGH.  
 GEORGE BELL.  
 JAMES WALTER CURRY.  
 GEORGE MACDONALD.  
 GEORGE RITCHIE.  
 THE HON. DAVID MILLS.

*Matriculants.*

F. M. YARNOLD.  
 ALFRED D. HOWARD.  
 THOMAS D. ANDERSON.

*Juniors.*

THOMAS CHAPPLIN.  
 R. W. LEEING.

ALEXANDER MILLS.  
 J. A. MULLIGAN.  
 N. H. MACRAE.  
 D. McF. FRASER.  
 H. C. HAMILTON.  
 M. MCKENZIE.  
 A. A. MAHAFFY.  
 W. LEES.  
 H. C. MONK.  
 W. A. WERRETT.  
 W. G. THURSTON.  
 A. W. MORPHY.  
 F. E. TITUS.  
 E. J. HEARN.  
 D. C. MURCHISON.  
 F. S. WALLBRIDGE.  
 J. A. WALKER.  
 A. D. KEAN.  
 A. O. BEARDMORE.  
 F. W. FOWLDS.  
 C. L. MAHONY.  
 F. W. GARVIN.  
 W. J. MARTIN.  
 J. H. HAMMOND.  
 G. F. RUTTAN.  
 W. L. J. HAIGHT.  
 F. C. ATKINSON.  
 J. STEWART.  
 R. O. KILGOUR.  
 J. J. CONACHER.  
 E. H. MYLNE.  
 D. J. O'KEEFFE.  
 W. F. SORLEY.  
 H. V. GREENE.  
 A. J. REID.  
 R. McF. MENZIES.  
 E. R. REYNOLDS.

*Articled Clerks.*

W. J. WRIGHT.  
 R. HOLMES.  
 C. M. B. LAWRENCE.  
 B. HAWKSWORTH.  
 C. E. START.

### PRIMARY EXAMINATIONS FOR] STUDENTS-AT-LAW AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

*CLASSICS.*

Xenophon, Anabasis, B. I.; Homer, Iliad, B. I.; Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.



## LAW SOCIETY, EASTER TERM.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

## ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. *Museaus, Stumme Liebe. Schiller, Lied von der Glocke.*

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or, Virgil, *Aeneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court

of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and Amending Acts.

The Subjects and Books for the Second Intermediate Examination shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

## SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Hayne's Outline of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. — Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd Year. — Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I. and chaps. 10, 11, and 12 of Vol. II.

4th Year. — Smith's Real and Personal Property, Harris's Criminal Law, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

## DIARY—CONTENTS—EDITORIAL NOTES.

## DIARY FOR OCTOBER.

2. Wed. Prince Arthur visited Toronto.
7. Mon. County Court term begins.
8. Tues. Chicago destroyed by fire, 1871. Harrison, C. J., sworn in as C. J. of Q. B., 1875.
9. Wed. Moss, J., sworn in as Judge of the Court of Appeal, 1875.
11. Fri. Guy Carleton, Gov. of Canada, 1774.
12. Sat. County Court term ends.
13. Sun. Battle of Queenston Heights—Brock killed, 1812.
24. Thur. Sir J. H. Craig, Gov.-Gen., 1807.
25. Fri. Battle of Balaclava, 1854.

## CONTENTS.

EDITORIALS :	PAGE
Death of Lord Chelmsford and Judge Keogh.....	255
Rate of interest on notes after maturity.....	255
Jurisdiction in Lunacy.....	255
Appeals in England.....	255
Death of Henry William May.....	255
Proof of Foreign Law.....	256
Appointment of Mr. Jette as Judge.....	256
Is a Debt secured by Note garnishable?.....	256
SELECTIONS :	
Constructive Murder.....	258
Official Costume.....	260
Marriage procured by Fraud.....	261
Liability of City for acts of Officers.....	261
Constructive Assault.....	261
Dignity of the Bench.....	261
NOTES OF CASES :	
Court of Appeal.....	263
Common Pleas.....	263
Chancery.....	263
CANADA REPORTS ;	
QUEBEC—	
John Kerry et al.....	264
Trade Marks—Charitable Corporations.....	
ENGLISH REPORTS :	
Digest of the English Law Reports for February, March and April, 1878.....	265
LAW STUDENTS' DEPARTMENT :	
Examination Questions.....	274
CORRESPONDENCE.....	276
FLOTSAM AND JETSAM.....	277
LAW SOCIETY OF UPPER CANADA.....	280

## Canada Law Journal.

Toronto, October, 1878.

The Right Hon. Frederick Thesiger, Lord Chelmsford, Lord Chancellor of England, under Lord Derby's administration, died at London, on the 6th inst., at the age of eighty-four.

Mr. Justice Keogh, of the Irish Bench, whose insanity culminated recently in an attempt to take the life of his servant, hanged at Bohn, whither he had been sent to a private asylum.

An esteemed correspondent calls attention to a recent case on a subject referred to last month: *i.e.*, the rate of interest that can be recovered, after maturity, on a promissory note which bears interest at a rate higher than the legal rate of six per cent. His letter, with some observations thereon, will be found in another place.

THE jurisdiction in lunacy is being extended in England after a very alarming fashion. From the report of the Commissioners in Lunacy to the Lord Chancellor, it appears that the total number of registered lunatics, idiots, and persons of unsound mind in England and Wales, on the first of January last, was 68,538. This indicates an increase of nearly two thousand on those returned for the previous year.

FROM the 1st Jan., 1877, to the 11th March, 1878, there have been 253 appeals from the decisions of the judges of the Chancery division in England, that is, from the Master of the Rolls, the three Vice-Chancellors and Mr. Justice Fry. Of these appeals 106 were successful in effecting a reversal or a material alteration in the decision appealed from, and 147 were dismissed.

Henry William May, the author of the treatise on Fraudulent Conveyances, and joint editor of the last edition of Seton on Decrees, died lately at the early age of 34 years. His first and best known book was written when he was 27. A very interesting collection of facts might be made regarding valuable law-books written when their respective authors were little more than "infants." Among others present to our recollection are the following: Sander's Essay on Uses and Trusts; Sugden's treatise on Vendors and Purchasers; Preston's Essay on

## IS A DEBT SECURED BY PROMISSORY NOTE GARNISHABLE?

Estates, and Lewis's book on Perpetuities, all of which were published before the writers had attained the age of twenty-two.

¶ IN the case of *Cartwright v. Cartwright*, 26 W. R. 684, the eminent counsel, Mr. Bompas, Q.C., was called as an expert to prove the validity of a marriage solemnized in Montreal. His acquaintance with Canadian law was derived from his having practised for many years before the Privy Council, the final Court of Appeal for the Dominion. But Hannen P. rejected the evidence as not admissible, being after all, knowledge acquired by study and not as an expert. A collection of cases on this subject will be found in *Third National Bank of Chicago v. Cosby*, 43 U. C. R. 63.

Mr. L. A. Jette, of Montreal, has been appointed one of the Judges of the Superior Court of Quebec, to fill the vacancy caused by the death of the late Mr. Justice J. P. W. Dorion. Mr. Jette was called to the Bar in February, 1857. He successfully opposed Hon. G. E. Cartier in 1872 at the election for the Eastern Division of Montreal, and after the defeat of Sir John A. Macdonald's Government in 1873, he was in 1874 elected for the same constituency by acclamation. His reputation at the Bar has been very good, and the appointment will, we believe, meet with general satisfaction in the Province of Quebec.

The lay press have been falling foul of Mr. Justice Hawkins for insisting upon Sheriffs attiring themselves in some costume appropriate to their office, such as a Court dress, military uniform, or other official costume. We quite agree with the observations of a cotemporary which appear in another place (*post* p. 261), and we also agree with Mr. Justice Hawkins

that the eternal fitness of things requires some distinctive mark of the high office of Sheriff. This is not a mere matter of sentiment; those most familiar with the hidden springs of thought of the great mass of humanity, and especially of those in the humbler walks of life, know well the effect of outward display. The importance of keeping up that "pomp and circumstance" which impresses them more than anything else with the power and majesty of the law can scarcely be overestimated. Britons who "never will be slaves" are, nevertheless, more or less savages in this respect.

## IS A DEBT SECURED BY PROMISSORY NOTE GARNISHABLE?

Under proceedings in foreign attachment, by the Custom of London, it was a part of the practice to attach a debt for which a bill or note was given on the ground that it was *debitum in presenti solvendum in futuro*: Ashley p. 124.\* So in *Carr v. Baycroft*, 4 U. C. L. J. 209, it appears that a debt, for which a promissory note had been given, was permitted to be attached, and it was thought by Mr. Justice Burns that, in an action on such note, it would be an answer to plead the attaching order. This would probably be the case so long as the judgment debtor continued to be the holder of the note, but what would be the position of the garnishee, if this note had been *bonâ fide* endorsed over? Again, in *Shanly v. Moore*, 9 U. C. L. J. 264, Mr. Justice Wilson refers to money due on a bill or note and engaged to be paid on a day yet to come as being garnishable.

\* In case of any difficulty arising in the operation of the garnishee clauses it has been said that reference may be made to the proceedings by foreign attachment from which the Statute takes a part of its language in order to shew that the legislature did not intend to give a less effectual remedy than that given by the Custom: *Sparkes v. Young*: 8 Ir. C. L. R., p. 261.

## IS A DEBT SECURED BY PROMISSORY NOTE GARNISHABLE?

Such also is the view of Mr. Justice Crompton as given in the *Law Journal* report of *Jones v. Thompson* : 27 L.J.Q.B. 289, where he says : " There must be a debt, which, though not due in point of payment, is yet an absolute debt. There is a large class of cases which come under this head, such as the case between the drawer and payee of a promissory note still running, in which I have always held at Chambers, and I understand other judges also, that there is a debt." Similar language is given in the report in the *Jurist* (1 Jur. N. S. 338), but in the regular report, as found in Ell. B. & Ell. 63, all this passage is expunged.

In *Mellish v. Buffalo, Brantford v. Goderich R. Co.* 2 U. C. L. J. 230, an attaching order had been made by Burns, J., in respect of a debt due on two acceptances made by the garnishee in favour of the judgment debtor. One of these was overdue, the other not yet due. Upon the summons to pay over the garnishee objected that the judgment creditor should shew that the acceptances were still in the hands of the judgment-debtor or under his control, so that he might not have to pay twice. In this, Hagarty J. agreed, saying, that it would not be safe to make an order, as it was quite possible the acceptances might be in the hands of *bona fide* holders for value prior to the granting of the order to pay over (if such were made). He observed that the difficulty in carrying out the garnishee clauses, with regard to bills and notes and other floating securities for money, arose from the non-existence of any enactment in Canada, similar to Imp. Stat. 1-2 Vict. c. 110, s. 12, by which the Sheriff can seize bills and notes under a *fi. fa.*,—the effect of the service of the order to attach being the same as the effect of the delivery of the

writ to the Sheriff. He preferred letting the Court dispose of the matter in term and so enlarged the summons. We have been unable to trace this case any further, but a very similar case of the same name is to be found in 2 P. R. 171. There Robinson, C. J., is reported to have questioned whether the garnishee clauses are applicable to a debt secured by negotiable bills, not yet due,—it being of so shifting a nature, dependent on the holders' endorsing them away before the attaching order was served, and even endorsing them away at any time before they were due. The remedy intended to be given to the judgment creditors in such cases would seem to be imperfect, at least without the hazard of embarrassment and injustice to others, so long as there are no means of seizing such securities under an execution. In *Turner v. Jones* : 1 H. & N. 883, Bramwell, B. expressed a doubt upon the matter thus : " The garnishee was indebted to the judgment debtor in a sum of money, for which he agreed to give bills of exchange payable at certain future periods. Therefore the debt was not actually due but accruing due ; and it may be that such a debt is not attachable, but upon that point I give no opinion." The next recent case is a decision of the Irish Court of Queen's Bench in *Pyne v. Kinna* : Ir. R. 11. C. L. 40. It was there held that a promissory note, not yet due, was not the subject of an order to attach. The weightiest reason is that assigned by Lawson, J., who said : " This being a negotiable instrument no order of ours can prevent its being endorsed over." The Chief Justice Morris gave a reason which does not strike us as very forcible. He said : " What evidence of debt is there in a promissory note ? There may have been no consideration." But the Court came to the conclusion unani-

## CONSTRUCTIVE MURDER.

mously that there was no weight in the *dicta* we have referred to in *Jones v. Thompson*, and they declined to make a precedent.

There is now power to seize promissory notes under execution in this Province, given, after the *Mellish and Buffalo* case, by 20 Vict. c. 57, s. 22, which was consolidated in C.S.U.C. c. 22, s. 261. But we fail to see how this helps the matter, or how it gets rid of the difficulty indicated by Mr. Justice Lawson. Because, as pointed out by Vankoughnet, C., in *McDonell v. McDonell*, 1 Chy. Cham. R. 140, writs of execution only bind moneys or securities for money from the time of actual seizure by the Sheriff or of some act symbolical therewith or tantamount thereto; and he puts this case: A. holds the promissory note of B. in Toronto; an execution issues against A., and is placed in the Sheriff's hands, while he holds the note. A. subsequently discounts, with a bank at Hamilton, the promissory note of B. If that note was bound as the property of A. by the dating of the writ to the Sheriff, what property would the bank have acquired in it? There seems to be no machinery by which a negotiable note, still current, can be bound in the hands of the judgment debtor by the mere service of the attaching order. It would be inexpedient in the interests of trade to hold that the service of such an order imposes a lien or charge on the note, subject to which any transfer must be made; and that thus an equity attaches to the note so as to affect it, in the hands of an innocent transferee. And if this be so, it seems more expedient that the judges, exercising the discretion they have under the garnishee clauses (see per Martin, B., in *Jones v. Turner*: 25 L. J. Ex. 319) should decline to interfere in cases of debts secured by current negotiable instruments.

## SELECTIONS.

## CONSTRUCTIVE MURDER.

The case of Walter Richards, which came before Mr. Hannay lately, has attracted, and is likely for some time to attract, considerable attention, inasmuch as a more thoroughly representative case on the peculiar theory of our law known as the doctrine of constructive murder could not well be imagined. The unfortunate young man, in shooting at a thief, or a supposed thief, who was retreating from the house where he resided, accidentally killed his mother who was endeavouring to detain the man at the same time. Of course before the doctrine in question can be applied to this case there is, as the magistrate observed, a preliminary point to be decided—namely, whether the firing at a retreating thief is or is not a felony or an unlawful act. On this point, for obvious reasons, we shall not enter into any discussion, nor do more than allude to the case of *Reg. v. Dadson*, (2 Den. 35); but we think we may be permitted to make a few general remarks on the theory of constructive murder with a view to showing its extremely dubious origin, and accounting for its existence in our books, a subject which derives additional interest from the fact that the theory will not survive the passing into law of the new Criminal Code.

The rule of our law as it at present exists, stands thus: A felonious purpose, though it be wholly unconnected with any design to occasion death, constitutes, in conjunction with an accidental killing, the crime of wilful murder. And accordingly, to quote the words of the first Report of the Criminal Law Commissioners (40, 41), "if a party shooting at a domestic fowl with intent to steal it, by some accident kill a person not known by him to be near, the felonious intent in shooting at the fowl, when coupled with the fact of a man being so killed, makes the party liable to suffer death as a murderer. In such a case (they proceed) it is very likely that the prisoner would have shrunk from the commission of the act if it had been at all probable that the

## CONSTRUCTIVE MURDER.

prosecution of it would have been attended with personal injury to anyone; and in this respect the case differs from that in which it was decided that a smuggler firing at a revenue officer and killing himself was guilty of suicide. It has appeared to us that in the first of such cases life is sacrificed without a corresponding benefit to society by way of example. For as the offender cannot reasonably be supposed to have contemplated the crime for which he suffers, so it is scarcely to be expected that the example of his punishment will have any sensible effect in deterring others from acts which, according to common experience, are never likely to lead to the same fatal termination." With these observations few will be inclined to disagree, but very general curiosity might be felt in the inquiry how a doctrine altogether peculiar to the jurisprudence of this country, and totally incongruous with its general principles, should have come to be recognised as a clear rule of law. The explanation which has been often given, and which we venture to think is the correct one, is that it sprung from a blunder made by Sir Edward Coke in the interpretation of a passage from Bracton. The passage is as follows: "Sed hic erit distinguendum utrum quis dederit operam rei licitæ vel illicitæ—si illicitæ, ut si lapidem projecit quis versus locum per quem conveuerunt homines transitum facere, vel dum insequitur quis equum vel bovem et aliquis a bove vel equo percussus fuerit et hujusmodi hoc imputatur ei."—(Bracton, 1. 3, c. 4.) It can be seen at a glance that all Bracton intends to convey by this is that killing in the case he mentions would be unlawful; he in no way states that it would amount to murder ("murdrum"), which term indeed had quite a special and peculiar significance at the time at which he wrote, being properly confined to crimes of the nature of secret assassinations. Bracton, in fact, was too familiar with the Roman law (in which the rule on constructive murder is the exact converse of our own, Dig. 48, 8, 7) to have made such a mistake; but Coke translates and elaborates the above passage in this way: "If," he says (1ust. Part III., ch. 8, p. 56, citing Bracton in the margin), "the act (*i.e.*, the act in the

perpetration of which the killing occurs), be unlawful, it is murder. As if A., meaning to steal a deer in the Park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, for the act was unlawfull, although A. had no intent to hurt, nor knew not of him; but if B., the owner of the park, had shot at his own deer, and, without any ill-intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and not felony. So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium*, for it was not unlawful to shoot at the wilde fowle; but if he had shot at a cock or hen, or any tame fowle of another man's, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull."

Even if Bracton had ever stated, or meant to have stated, this as part of our law in his time, his reputation was hardly sufficient, in the face of reason and common sense, to have caused its retention in our books; for, although Coke, on one occasion, describes him as "some time a famous judge of the Court of Common Pleas" (as I find in record) "and a writer of the laws," we find that in *Stowely v. Lord Zouch* (Plowd. 357), Chief Baron Saunders cited him "not as an author in the law, for that Bracton and Glanvil were not authorities in our law, but he cited him as an ornament to discourse where he agrees with the law;" and it appears that Chief Justice Catline was of the same opinion. The fame, however, of Coke stood upon a very different footing, and there can be no doubt that it is to that over-subtle and refined lawyer that we owe the theory of constructive murder, which has been copied from the Institutes without question or comment by such old writers as Bacon, Viner, Hawkins and Foster, and in modern times by Roscoe, Russell and Brown, whilst it has often been laid down as a law to jurors from the Bench, although, we believe, that on no single occasion has a prisoner been convicted and sentenced to death for constructive murder. In one well-known and comparatively recent case indeed (*R. v. Hor-*

## OFFICIAL COSTUME.

sey, 3 F. & F. 287), where a man, by setting fire to a stack of straw, had accidentally killed another who was in an adjoining outhouse, and was indicted for murder, it is amusing to see how ingeniously Lord Justice Bramwell put the case to the jury in favour of the prisoner, who, it appeared, had been much shocked and surprised to find that any one was in the flames, and when he saw and heard the deceased endeavoured to save him. His Lordship said that "the law laid down was that when a prisoner, in the course of committing a felony caused the death of a human being, that was murder, even though he did not intend it. And though that may appear unreasonable, yet as it is laid down as law, it is our duty to act upon it. The law, however, is that a man is not answerable except for the natural and probable result of his own act; and therefore if you should not be satisfied that the deceased was in the barn or inclosure at the time the prisoner set fire to the stack, but came in afterwards, then as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act. And in that view he ought to be acquitted on the present charge." This reasoning, which we venture to pronounce not altogether unworthy of the author of the theory of constructive murder, though righteously employed on the side of humanity, resulted in a verdict of not guilty.

Though lawyers are proverbially conservative, we think that it is a matter of some wonder that this doctrine, condemned as antiquated and incongruous by the Criminal Law Commissioners as far back as 1834, should have been permitted to survive to the present day, and more, that it should have been in terms preserved in the Amendment of the law of Homicide Bill, submitted to Parliament by Sir J. Eardley Wilmot, in 1876. But its days are now numbered, for though in the recent Criminal Code it is enacted that "Homicide is unlawful when death is caused accidentally by an unlawful act" (Ch. 19, sec. 133 c), there is no place for constructive murder in the following two definitions:—"Murder is unlawful homicide committed with, (a) An intention to cause the death of or

grievous bodily harm to any person whether such person is the person actually killed or not; or with (b) Knowledge that the act or omission to discharge a legal duty which causes death will probably cause the death of or grievous bodily harm to some person, whether such person is the person actually killed or not; although such knowledge may be accompanied by indifference whether death or grievous bodily harm is caused, or not, or by a wish that it may not be caused" (Ch. 20, sect. 134).—*Law Times*.

## OFFICIAL COSTUME.

The County of Derby has been thrown into a ferment by the action of Mr. Justice Hawkins towards the High Sheriff. It seems that the High Sheriff duly met Mr. Justice Hawkins and Mr. Justice Fry at the railway station, and conducted them to their lodgings, but failed to conform to the regulation that the High Sheriff should appear in uniform or Court dress. In fact, that great functionary was attired in ordinary morning costume. Thereupon Mr. Justice Hawkins, as the Senior Judge of Assize, made a communication, through the Under-Sheriff to the High Sheriff, to the effect that the latter must appear in Court either in uniform or Court dress. The High Sheriff pleaded, first, that he was not a deputy-lieutenant, and so was not entitled to wear a costume very familiar to all circuit-goers; second, that it was not the custom in Derbyshire for the High Sheriff to appear in uniform—in fact, that plain clothes were almost invariably worn. This latter right, which has, we believe, been more than once advanced in Leicestershire, resembles somewhat the claim of Baron Kingsale to wear his hat in the presence of the Sovereign; although even in the case of his lordship's claim King William III. expressed a hope that the privilege would not be exercised in the Queen's presence. However, Mr. Justice Hawkins displayed no sort of inclination to give way either to the plea of 'no uniform' or immemorial custom, and informed the Under-Sheriff that a fine of 500*l.* would certainly be inflicted on the High Sheriff in the event of that gentleman ap-

## SELECTIONS.

pearing the next day in Court in plain clothes. In the meantime his lordship declined to recognise the High Sheriff, just as the Court fails to 'see' counsel when not robed. At length the High Sheriff conceded the point at issue, and made his appearance in Court in the uniform of a Captain of Volunteers.

Of course this action on the part of Mr. Justice Hawkins has excited, and will excite, ridicule in certain quarters; but the learned Judge was quite right. The Judges represent the Sovereign at the Assizes, and the High Sheriff is bound to attire himself as though he were in the royal presence. This compliment or duty is not paid to the Judges personally, but to Her Majesty, as represented by her commissioners. But, apart from rule, there can be no question that the state and pomp wherewith Judges are received at Assizes impress the popular mind with the sanctity of justice, and the respect due to the law and the administrators of the law. The antiquity of our law, its unbroken tradition, its permanent power, strike upon the imagination, when the pomp and circumstance of eight centuries are year by year presented to the eye. The splendour of a Norfolk reception is preferable to Derbyshire simplicity in the opinion of all who believe in effects produced upon the popular mind by the outward majesty of the law.

In *Tompsett's Ex'rs v. Tompsett*, 13 Bush (Ky.), 326, it is held that a marriage procured by fraud is voidable only at the election of the party defrauded. The party who commits the fraud is bound, and remains so until the party deceived has made his or her election, and will thereafter be bound or not, according to the election made. It is laid down by the text writers, that all marriages procured by force or fraud are void, for the element of mutual consent is wanting, which is essential to every contract. Schouler's *Domestic Relations*, 35; 2 Kent's *Com.* 76. But Bishop (1 Bish. Marr. & Div., § 214) says: "We may presume that the party guilty of the wrong would not be permitted, so far to take advantage of it, as to maintain a suit of nullity on that ground. The other

party may, if he choose, waive his objection and thereby render the marriage good." This is the doctrine of the principal case. See, also, *State v. Murphy*, 6 Ala. 765. Bishop, however, says that the authorities are clear to the general conclusion that fraud, error or duress, may render the marriage void. See *Hartford v. Morris*, 2 Hag. Con. 423; *Portsmouth v. Portsmouth*, 1 Hag. Ecc. 355; *Jolly v. McGregor*, 3 Wils. & S. 85, *Burtis v. Burtis*, Hopkins, 557; *Scott v. Shufeldt*, 5 Paige, 43; *Perry v. Perry*, 2 id. 501; *Clark v. Field*, 13 Vt. 460; *Hull v. Hull*, 15 Jur. 710; *Robertson v. Cole*, 12 Tex. 356. It is said, however, that a voluntary cohabitation after knowledge of the fraud or error will cure the defect. *Hampstead v. Plaistow*, 49 N. H. 84. These marriages, therefore, in a certain respect, are rather to be considered as voidable than void, and in some works they are treated under the head of voidable. See Rogers' *Eccl. Law*, 2d ed., 643. But the great weight of authority is that until the innocent party has consented, the transaction is incomplete and the ceremony is to be regarded as a mere nullity. 1 Bish. Marr. & Div., § 215; *Respublica v. Hevce*, 3 Wheeler's Cr. 505; *Tarry v. Browne*, 1 Sid. 64; *Fulwood's Case*, Cro. Car. 482.

In *Pollock's Administrator v. Louisville*, 13 Bush (Ky.), 221, it is held that for wilful negligence of policemen appointed by a city in making arrests upon charges of felony, the city is not liable. And in *Greenwood v. Louisville*, at page 226 of the same volume, the city is declared not to be liable for injuries caused by the negligence of firemen appointed and paid by it under a law requiring it to maintain a fire department, while in the discharge of their duty. The general rule is that policemen appointed by a city are not its agents, but the agents of the State, while engaged in those duties which relate to the public safety and the preservation of public order. For that reason, it has been held that a city is not liable for assault and battery committed by its policemen, though done in an attempt to enforce an ordinance of the city; nor for an arrest made by them which was illegal for want of a warrant; nor for their unlawful acts of violence



## SELECTIONS.

whereby, in the exercise of their duty of suppressing an unlawful assemblage of slaves, the plaintiff's slave was killed. *Dill on Mun. Corp.*, § 773; *Butterick v. Sewell*, 1 Allen, 172; *Kimball v. Boston*, id. 417; *Pesterfield v. Vickers*, 3 Coldw. 205; *Ready v. Mayor, etc.*, 6 Ala. 327; *Dorgan v. Mobile*, 31 Ala. 469; *Richmond v. Lang's Adm'r.*, 17 Gratt. 375. The rule as to the liability of cities for the acts of members of their fire department is stated in *Fisher v. Boston*, 104 Mass. 87; 6 Am. Rep. 196. "In the absence of express statute therefor, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or public way." See, also, *Hafford v. New Bedford*, 16 Gray, 297; *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray, 541; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; *Jewett v. New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Torbush v. Norwich*, 38 Conn. 225; 9 Am. Rep. 395; *Ogg v. Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Hayes v. Oshkosh*, 33 Wis. 314; 14 Am. Rep. 760; *Elliott v. Philadelphia*, 75 Penn. St. 342; 15 Am. Rep. 591. For a careful discussion of the principle involved in these cases see *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468.

The doctrine of constructive assault received an important illustration in the case of *Hegarty v. Shine*, 12 Ir. L. T. Rep. 100, decided by the Queen's Bench Division of the Irish High Court of Justice on the 18th of June last. The action was brought by a young woman against her paramour, for breach of promise of marriage and assault. The alleged assault consisted in this: The plaintiff permitted defendant to have illicit intercourse with her, supposing him to be in sound health, but he was at the time suffering from contagious venereal diseases, which fact he concealed from plaintiff, and through the illicit intercourse infected her therewith. This was claimed to be a constructive assault, but a majority of the court held otherwise on the ground that the injury complained of was directly consequent on a wilful act of immorality on the part of plaintiff, and no cause of

action arising *ex turpi causa* can be maintained. The principal English case on this subject is *Regina v. Bennett*, 4 F. & F. 1005, where the prisoner, who had slept with his niece with her consent, and communicated to her a syphilitic disorder, was held guilty of an assault. In *Regina v. Sinclair*, 13 Cox's C. C., the defendant, knowing that he had a venereal disease, induced a girl to have connexion with him without informing her of the fact, and communicated the disease to her. It was held that an indictment for inflicting actual bodily harm could be sustained by those facts. The court in the principal case disagrees with both of the decisions cited, but by a divided bench. The cases are, however, distinguishable from that class where a woman consents to intercourse under the impression that she is receiving medical treatment, such as *Reg v. Flattery*, 13 Cox's C. C. 385; *Reg v. Case*, 4 id.; *Don Moran v. People*, 25 Mich. 356; 12 Am. Rep. 183; or where one gives to another a food containing substance injurious to health, such as *Commonwealth v. Stratton*, 114 Mass. 303; 19 Am. Rep. 350, and *Commonwealth v. Burke*, 105 Mass. 376; 7 Am. Rep. 531. The distinction is that in those instances last cited the female consented to one thing and the prisoner did another, while in the principal case the woman was consenting partly to the immoral act.—*Albany Law Journal*.

We are afraid our excellent contemporary, the *Chicago Legal News*, has "put its foot in it." The *Solicitors' Journal* having innocently said something about its being difficult for the "popular mind to grasp the idea of the majesty of the law as personified, for instance, in the American courts, which, according to the description of a recent writer, consists of 'an elderly gentleman, sitting on a cane bottom chair and expectorating thoughtfully,'" the *Legal News* reads "our learned and respected contemporary" a lecture, and informs it among other things that, "There is no country in the world where the judges of inferior courts of record preside with more dignity and indulge in less wrangles with attorneys, and are more respected by the bar and people, than in America." This is all well.

enough, if it be true, and it ought to be ; but we doubt if it will have its due weight on the minds of "our learned and respected contemporary," for in the very next article in the *Legal News*, we are given an account of "professional etiquette on the frontier," wherein is stated the cause of the great unpopularity of Judge Beck, "Judge of Wyoming." We quote :

"He even carried his whim of professional propriety so far as to prohibit swearing in court, and is said to have fined a lawyer who swore at a witness during his cross-examination. Another peculiarity of this judge is a dislike of seeing attorneys, when arguing a case before him, pass around a bottle of whiskey, and he is said to be violently opposed to lawyers treating the jury to "drinks" while a trial is in progress. Judge Beck is said to have violated common decency by refusing to proceed with a case until the attorneys engaged in it should put out their pipes ; and a community once rose in indignation when he ordered a lawyer to remove his feet from the judge's desk."

This was all, no doubt, very difficult for the "popular mind" to submit to, but when Judge Beck instructed the grand jury "to indict every man who indulged in gambling, or sold liquor without a license, the outraged public demanded his removal." As is usual under like circumstances in this country, the Legislature was "seen," and the result was that a "redistricting act" was passed, and Judge Beck was assigned to a district without "a town or a court house, and entirely uninhabited, except by military garrisons, Indians and wild beasts." The "popular mind" was thereby satisfied. Of course, Judge Beck was not a "politician" — a "machine politician" — or he never would have so run counter to the "sense of the people" — and this suggests the wonder, how, not being a "politician," he got his appointment — but however that may be, the *Legal News* should have remembered that the degenerate foreigner is not up in these matters, and should have kept its lecture and Judge Beck's case apart. By the way, we believe that women are voters and "lawyers" in Wyoming. — *Albany Law Journal*.

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### COURT OF APPEAL.

ADAMS V. WOODLAND.

*Insolvent Act of 1875—Debt barred by discharge—  
Promise to pay.*

C. C. York.] [Sept. 3.  
*Held*, reversing the judgment of the County Court, that a promise to pay a debt from which a discharge under the Insolvent Act of 1875 has been obtained, is founded on a consideration which will support an action.

*Jones v. Phelps*, 20 W. R. 92, and *Heather v. Webb*, L. R. 2 C. P. D. 1. distinguished.

*J. E. Rose*, for the appellant.

*Akers*, for the respondent.

*Appeal allowed.*

### COMMON PLEAS.

IN BANCO.

MASON V. BORROUGHS ET AL.

*Agreement—Costs.*

Under a written agreement between the parties, two actions between them, at the suit of the parties respectively, were settled in consideration of the payment by the defendants of a named sum and all costs of the two suits. In an action for the costs.

*Held*, Hagarty, C. J., dissenting, that the true agreement was, that the defendants should pay to the plaintiff his costs of both actions except the counsel fees, such costs to be as settled by the master, for which the plaintiff was to have a verdict.

*Richards*, Q. C., for the plaintiff.

*M. C. Cameron*, Q. C., for the defendant.

### CHANCERY.

Chancellor.] [Sept. 4.

WILSON V. OWENS.

*Fraudulent conveyance—Parol evidence—Resulting trust.*

A suit for alimony having been instituted against the plaintiff, he, for the purpose of protecting his lands from process therein, conveyed the same to his solicitors for a money consideration, and the solicitors afterwards made a conveyance of the same lands to the sister of the plaintiff, the consideration money being paid by the plaintiff. The Court held there was a resulting trust in favour of the plaintiff, and decreed

## JOHN KERRY, ET AL., V. LES SEURS DE L'ASILE DE LA PROVIDENCE.

relief accordingly; but under the circumstances without costs.

Chancellor.]

[Sept. 16.

DYNES V. BALES.

*Cloud on title.*

A person having no title to the lands in question, made a conveyance thereof to another, and took back a mortgage for the alleged price, both of which instruments were duly registered. *Held*, that the fact of registration, notwithstanding the decision in *Hurd v. Billington*, 6 Gr. 145, entitled the owner of the lands to a decree in this Court for the cancellation of such registration as a cloud upon his title.

Chancellor.]

Sept. 16

SMITH V. ELLIOTT.

*Insolvency—Mortgages.*

Where an insolvent mortgagor obtained his discharge in insolvency, and afterwards procured from the assignee a transfer of the equity of redemption, the Court, in a foreclosure suit, refused to give any personal remedy by *fi. fa.*, against the goods of the mortgagor, although it might be that the mortgagee was entitled to obtain from the insolvent a release of his interest.

Full Court.]

[Sept. 17

MCDONALD V. NOTMAN.

*Insolvency—Express promise to pay.*

Although a debt which has been extinguished by the discharge of the debtor in Insolvency is a sufficient consideration for an express promise to pay the claim, it is not sufficient to raise an implied promise, by a voluntary payment, subsequently to such discharge, of part of the claim.

## CANADA REPORTS.

## QUEBEC.

JOHN KERRY et al. (plaintiffs in the Court below), Appellants; and LES SEURS DE L'ASILE DE LA PROVIDENCE (defendants in the Court below), Respondents.

*Trade mark, name of a substance cannot constitute—Charitable Corporation's right to trade.*

The term "Syrup of Red Spruce Gum," being only the name of a substance, does not properly constitute a trade mark, and the sale of another preparation, differing essentially in external appearance and composition, under the name "Syrup of Spruce Gum," is no violation of such mark.

This was an appeal from the judgment dismissing the suit brought by Messrs. Kerry & Co. against the Nuns for infringement of their trade marks by selling an imitation of Gray's Syrup of Spruce Gum. The Judge of the Superior Court held that there had been no violation of plaintiff's trade mark, and that the words,

"Syrup of Spruce Gum," could not properly constitute a trade mark, involving, as they do, only the name of a substance, and plaintiffs had no monopoly of such words. The Judge held that the Nuns had been competing improperly in the market with the plaintiffs, but it was for the Crown alone to prosecute corporations for exceeding their powers, and added that the plaintiffs themselves proved no license or privilege possessed by them to trade. The defendants had brought an incidental demand for damages against the plaintiffs for interference with their sale of Spruce Gum. This was also dismissed, on the ground that although the interference was held to be proved, yet the defendants had drawn the trouble upon themselves by trading in excess of their charter rights.

DORION, C. J., said he found that his firm had formerly acted as counsel for the Nuns in connection with this matter, and he could not take part in the judgment; but as the other four judges were unanimous, the judgment would be rendered.

RAMSAY, J., said the action substantially was brought for the violation of a trade mark—that was the principal object. The plaintiff in the court below brought his action against the Nuns for having used a trade mark, and he sought to obtain damages, and also asked for an account from the Nuns, and that they be restrained from further selling goods marked with this mark. The first question the court had to examine was whether there was a trade mark in the possession of the appellants, and then whether that trade mark was violated or not. With regard to the question whether there was a trade mark validly in the possession of the appellants, the question did not come up so much in this court as it did in the court below, because in the court below there was a cross demand by the Nuns against the appellants for having violated their trade mark. The cross demand was rejected, and there was no appeal taken from that dismissal. The ground on which the incidental demand was dismissed was, that the Nuns were not a trading corporation, and had no right to have a trade mark. The question now was whether Kerry & Co.'s trade mark was violated by the action of the Nuns in selling a particular kind of spruce gum. What was violation of a trade mark? It was taking the trade mark of another and using it. There was another kind of violation; you might take something that was similar, and present it in such a shape that it would deceive the public, and thus defeat the object of the trade mark. That was precisely what the appellants pretended the respondents had done in this case. They said: You have taken not exactly our trade mark; but you have gone and made another

## DIGEST OF ENGLISH LAW REPORTS.

thing like our syrup of spruce gum, and make people buy it instead of ours. The question whether the things were exactly the same did not arise here. If it appeared that the Nuns had made a bottle for the same object, with a sufficient resemblance to deceive the public, they would have been within the law. In this instance, the things were of convenient size, and they had been produced to speak for themselves. [Here the learned Judge held up two bottles, one of each of the syrups, which differed greatly in colour and external appearance.] The Court was asked, as reasonable human beings, to say that these bottles could be mistaken for one another. The external appearance was different, and the internal contents were different. That disposed of the most important branch of the case, that is, the special wrong which Messrs. Kerry & Co. had alleged against these ladies. His Honour continued, that unless his attention had been particularly drawn to the declaration, he would not readily have observed that there was another branch of damages alleged here of a very peculiar character. The allegation was to this effect: these ladies being a charitable corporation, and having been incorporated for purposes of charity, could not be subjected to any taxes, and yet carried on the business of apothecaries, and did so to the injury of plaintiffs, and that the plaintiffs had a direct action against the ladies to compel them to pay damages for having thus carried on business. Taking it for granted for a moment that damages had been established, did such an action lie. The code says an action may be brought where injury has been caused by another's fault. His Honour could not see that the respondents had done the appellants any harm by the selling of this Spruce Gum. It was a remedial preparation, and charitable corporations had never been precluded from making such things. Governments in France interfered when such things came to be an abuse. But the Court was asked here to say to what extent these people were to use their privileges. His Honour did not feel disposed to enter upon this ground at all. He could not conceive that these ladies had at all violated their charter. There was a difference in the things. It was well known there was two trees—one *épinette blanche*, and the other *épinette rouge*. Messrs. Kerry & Co. called their's, syrup of red spruce gum. There was little gum in the red spruce, while the *épinette blanche* was full of gum. Mr. Justice Cross had made some historical researches, and found that this was a very ancient remedy, and Jacques Cartier, in his first voyage, spoke of having cured the scurvy by an extract of *épinette*—a remedy which had been learned from the Indians. Perhaps it was in allusion to this that Mr. Gray had a wild Indian, half clad, sitting on a stone, in his trade-mark. The

judgment appealed from was a good one, and must be confirmed.

CROSS, J., cited from Canadian history to show that the remedy sold by the Nuns was well known formerly. He remarked that in his individual opinion the question whether these ladies had the right to trade was sufficiently raised in the case, and as the Court below had decided against them on this point the plaintiffs ought to be allowed the costs on the incidental demand. But this was only his own opinion. Judgment confirmed.—*Montreal Legal News*.

## ENGLISH REPORTS.

## DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH, AND APRIL, 1878.

(From the American Law Review.)

ACCEPTOR.—See **BILLS AND NOTES**, 1, 3, 5.

ADEMPTION.—See **BEQUEST**.

ADJACENT SUPPORT.—See **EASEMENT**.

ADVOCATE.—See **ATTORNEY AND CLIENT**, 1.

AGENT.—See **PRINCIPAL AND AGENT**.

AGREEMENT.—See **CONTRACT**.

AMBIGUITY.—See **WILL**, 1.

## ANCIENT LIGHTS.

In an action for obstruction of ancient lights, it appeared that plaintiff was entitled to access of light by prescription, and that defendant had diminished the light by erecting a high building opposite, but that there was still light enough for the business carried on in plaintiff's premises. COCKBURN, C. J., instructed the jury that they should bring in substantial damages, if they found that the light had been sensibly diminished, so as to affect the value of the premises, either for the purposes for which they had been previously used, or for any purpose for which they were likely to be used in the future. Defendants contended that the damages should be nominal, unless it appeared that the premises were injured for the purposes for which they had always been, and were still, used. *Held*, that the instruction of the judge was correct.—*Martin v. Goble* (1 Camp. 320) questioned. *Moore v. Hall*, 3 Q. B. D. 178.

ANIMUS MANENDI.—See **DOMICILE**.

## ANNUITY.

A testator gave an annuity to his son, with cesser and a gift over "if he shall do or permit any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged, or incumbered." The annuitant committed an act of bankruptcy by failing to answer to a debtor's summons. *Held*, that the annuity thereupon ceased.—*Ex parte Eyston. In re, Throckmorton*, 7 Ch. D. 145.

## ANTICIPATION.

A married woman, entitled under a will to £400 a year for her separate use, without power of anticipation, joined with her husband in mortgaging her interest under the will, by perpetrating a gross fraud upon the mortgagee as to the restraint upon anticipation. The mort-

## DIGEST OF ENGLISH LAW REPORTS.

gagee got judgment against them, and an order to charge the wife's income as it came due. *Held*, that the restraint on anticipation could in no case be evaded or set aside, even in case of such gross fraud.—*Stanley v. Stanley*, 7 Ch. D. 589.

## APPOINTMENT.

A testator gave real and personal property, in trust for his widow for life, and at her death for his children, as she should by deed or will appoint, and in default of appointment, to them equally. A son covenanted by his antenuptial settlement that if he received anything under his father's will, by virtue of any power of appointment, or in default of appointment, he would settle the same on the settlement trusts. The testator's widow subsequently, by deed containing power to revoke, appointed property to the son absolutely. The son then went through bankruptcy; and finally the widow died, without having revoked her appointment. *Held*, that the son had an interest under the will in the property before the widow appointed it to him, and therefore the trustee in bankruptcy was not entitled to it as against the trusts of the marriage settlement, under sect. 91 of the Bankruptcy Act.—*In re Andrews' Trusts*, 7 Ch. D. 635.

## See POWER.

## ASSIGNMENT.

B. proved against the estate of I., a bankrupt, for a certain sum; and then, for consideration, agreed to "undertake to pay over" to C. all the dividends coming to him in respect of the claim. B. subsequently went into bankruptcy. *Held*, that the above transaction was a valid assignment of a chose in action.—*In re Irving. Ex parte Brett*, 7 Ch. D. 419.

## See COVENANT, 3.

## ATTORNEY AND CLIENT.

1. Defendant, a Scotch adviser, was legal adviser and agent for two ladies, as trustees for their father's estate. Under his direction, two houses belonging to the estate were sold, nominally to defendant's brother, but in reality defendant himself was the purchaser, though without the knowledge of his clients. *Held*, that the purchase could not be enforced.—*McPherson v. Watt*, 3 App. Cas. 254.

2. During the progress of a suit, the plaintiffs mortgaged their interest in the estate concerned in the suit to the defendants therein. The plaintiffs' solicitor sanctioned the mortgage, and subsequently got his costs in the said suit charged on the plaintiffs' interest in the estate. *Held*, that under the circumstances the mortgage must be postponed to the costs, as the defendants must be held to have known of his lien when they took the mortgage.—*Faithful v. Ewen*, 7 Ch. D. 495.

## BANK.—See BILLS AND NOTES, 4.

## BANKRUPTCY.—See ANNUITY; APPOINTMENT; ASSIGNMENT; COMPOSITION; FIXTURES; LEASE.

## BEQUEST.

J. bequeathed "£1,000 D stock of the L. railway . . . now standing in the books of the company in the names of . . . the trustees of my marriage settlement . . . which stock it is my intention to have transferred into my name . . . unto G., C., and A., in trust for G." Shortly after the date of the will the L. railway paid off the stock; and just before his death testator had the amount received for it invested in the stock of the Y. railway, in the

names of the trustees of his marriage settlement. *Held*, that there was ademption of the specific legacy, and the Y. railway stock belonged to the residuary legatees. *Le Grier v. Finch* (3 Mer. 50) and *Clark v. Browne* (2 Sm. & Giff. 524) criticised.—*Harrison v. Jackson*, 7 Ch. D. 339.

## BILL OF LADING.

A bill of lading for a cargo of wheat, shipped at New York for Glasgow, contained an exemption from liability for loss from perils of the sea, or loss due to the negligence of the officers or crew of the ship. The cargo was injured by sea-water admitted into the hold, as the jury found, five days after sailing, through a port-hole negligently left unfastened by the crew; but the jury did not find whether the port-hole was left unfastened before the sailing or subsequently. *Held*, that the case must be remanded for a finding on this point, the question of liability depending upon whether the implied warranty of seaworthiness at the commencement of the voyage had been complied with.—*Steel et al. v. The State Line Steamship Co.*, 3 App. Cas. 72.

## BILLS AND NOTES.

1. The plaintiff, a merchant in London, procured a loan of £15,000 of the defendant bank, on the security of a cargo of goods in transit to Monte Video, and of six bills of exchange drawn by him on S., the consignee of the goods in Monte Video, and accepted by the latter. Two of these bills having been paid and two dishonoured, the defendant bank, through its branch in Monte Video, proposed to sell the goods at once, when the plaintiff wrote the defendant not to sell, and sent his check for £2,500, as additional security, adding, that when the bills were paid "you will of course refund us the £2,500." The defendant drew the check; and, the other two bills having been dishonoured, the defendant took proceedings against S., as a result of which the goods were, with plaintiff's consent, sold, and the bills, without plaintiff's knowledge, delivered up to S. cancelled. The proceeds of the goods were insufficient, even with the £2,500, to satisfy the claim. *Held*, that the plaintiff could not recover the £2,500 from the defendant.—*Yleasias v. The Mercantile Bank of the River Plate*, 3 C. P. D. 60.

2. A bill of exchange drawn by a firm in one country upon the same firm in another country, and accepted in the latter place, is perhaps strictly a promissory note; but the holder may treat it either as a promissory note or as a bill of exchange; and where it appears to have been the intention that it should be negotiable in the market as a bill of exchange, it should be treated as such.—*Willans et al. v. Ayers et al.*, 3 App. Cas. 133.

3. By 19 & 20 Vict. c. 97, § 6, "no acceptance of a bill of exchange, inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor, or some person duly authorized by him." *Held*, that the word "accepted," written across the face of the bill, and unsigned, did not satisfy the statute.—*Hindhaugh v. Blakey*, 3 C. P. D. 136.

4. The plaintiffs, holders of a promissory note payable at the M. branch of the defendant bank, and drawn by parties having an account at the Y. branch of the said bank, deposited it with the S. branch of said bank, to be sent to the M. branch for collection. The M.

## DIGEST OF ENGLISH LAW REPORTS.

branch, in the course of business, stamped the note as "paid," cancelled the signatures, and sent the S. branch a draft therefor in favour of the plaintiffs. The same day, the Y. branch, in its books, credited the drawers of the note with the amount thereof, but no notice of the credit was sent the drawers or holders. Two days later, the drawers becoming irresponsible, the M. branch wrote the S. branch to cancel the draft, and returned the note dishonoured, with the endorsement, "cancelled in error." There was no evidence as to the state of the drawers' account at the Y. branch. *Held*, that the effect of marking the note "paid," and cancelling the signatures, was rendered null by writing on it "cancelled in error," before returning it to the holders; and that the entries in the accounts between the branches of the bank as to payment of the note not having been communicated to the holders of the note, were not effectual to charge the bank with receipt of the money.—*Prince v. Oriental Bank Corporation*, 3 App. Cas. 325.

5. An acceptor of a foreign bill of exchange, subsequently dishonoured, is liable by way of a charge for re-exchange for all the necessary expense incurred by the drawer in consequence of its having been dishonoured by the acceptor.—*In re General South American Co.*, 7 Ch. D. 637.

BONDS.—See MORTGAGE.

BOVILL'S ACT.—See PARTNERSHIP.

BROKER.—See FACTOR.

CARRIER.—See COMMON CARRIER.

CAVEAT EMPTOR.—See SALE.

CHILDREN.—See DEVISE, 2; WILL, 4.

CHOSE IN ACTION.—See ASSIGNMENT.

CLASS.—See DEVISE, 2; PERPETUITY; WILL, 2.

CLIENT.—See ATTORNEY AND CLIENT.

COMITY.—See MORTGAGE.

COMMON CARRIER.

Plaintiff signed a contract with the defendant company, by which the latter was to carry some cheeses for plaintiff at "owner's risk"; that is, the company was to be responsible only for injury resulting from the "wilful misconduct" of its servants. In consideration of this limitation of liability, a lower rate was charged. The contract further stated that the company would carry goods at a higher rate, assuming all the usual liabilities of common carriers. The plaintiff had knowledge of all the foregoing facts. The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), § 7, permits railway companies to make such special contracts for carriage of goods as shall be adjudged "just and reasonable" by the court. The cheeses were so negligently packed by the company's servants that they were damaged; but the packers did not know that damage would result. *Held*, that the plaintiff could not recover. *Lewis v. The Great Western Railway Co.*, 3 Q. B. D. 195.

See RAILWAY.

## COMPOSITION.

A purchaser from a debtor, who, at the time of the purchase had filed a petition in bankruptcy, and whose creditors had accepted a composition, *held* not bound to inquire whether the instalments provided for in the composition had all been paid, as the debtor has complete control of his property from the time of the

composition until the creditors again take action under sect. 26 of the Bankrupt Act, and have him adjudged bankrupt.—*In re Kearley & Clayton's Contract*, 7 Ch. D. 615.

CONDITION.—See COMMON CARRIER; DEVISE, 4; POWER; SPECIFIC PERFORMANCE, 1.

CONSIDERATION.—See GUARANTY.

## CONSTRUCTION.

1. Oct. 21, at 12.40 p.m., the excise officer discovered a dog belonging to the respondent, and without a license. At 1.10 p.m., the same day, the owner took out a license, which ran "from the date hereof," &c. The dog law (30 Vict. c. 5) provides that "every license shall commence on the day" on which it is granted. *Held*, that the respondent had violated the act.—*Campbell v. Strangeways*, 3 C. P. D. 105.

2. The word "paintings," used in a statute in the phrase "paintings, engravings, pictures," *held*, not to include coloured working models, and designs for carpets and rugs, though painted by hand and by skilled persons, and each worth as much as £30 as models, but valueless as works of art.—*Woodward v. The London & North Western Railway Co.*, 3 Ex. D. 121.

See COVENANT, 1, 5; DEVISE, 2, 3, 4; GUARANTY; MORTMAIN; WILL, 4, 5.

CONTINGENT REMAINDER.—See DEVISE, 1.

## CONTRACT.

Plaintiff sued to recover £5 and a week's wages. Defendants set up a contract under which the plaintiff agreed to be conductor on defendant's tramway, and to deposit £5 as security for the performance of his duties; and, in case of his discharge for breach of the rules of the company, the £5 and his wages for the current week were to be retained as liquidated damages. The manager of the company was to be "sole judge between the company and the conductor" as to whether the same should be retained, and his certificate was to be binding and conclusive evidence in the courts as to the amount to be retained, and "should bar the conductor of all right to recover." Plaintiff was discharged for violating a rule of the company. *Held*, that the agreement was good, and the certificate of the manager that the forfeiture had been incurred was conclusive.—*The London Tramway Co., Limited, v. Bailey*, 3 Q. B. D. 217.

See COMPANY, 3; INFANT; SPECIFIC PERFORMANCE, 1, 2.

CONTRIBUTORY.—See COMPANY, 2, 4.

CONVEYANCE.—See VENDOR AND PURCHASER.

COPYHOLD.—See DEVISE, 3.

## COPYRIGHT.

O., a Frenchman, composed an opera, and had it performed for the first time, March 10, 1869, in Paris. An arrangement of the score for the piano, and also one for the piano with voices, were made by S., a Frenchman, with O.'s consent, and published in Paris, March 28, 1869. In June, 1869, O. assigned the opera and copyright, with the right of publicly playing and performing the music in England, to the plaintiff, and delivered to him the score. June 9, 1869, a copy of the piano arrangement was given to the registration officers, and the opera was registered under the Copyright Act (5 & 6 Vict. c. 45) and the International Copyright Act (7 Vict. c. 12), as follows. Title of the opera; name of the au

## DIGEST OF ENGLISH LAW REPORTS.

thor. O.; name of proprietor of the copyright, O. (given as "proprietor of the copyright in the music, and of the right of publicly performing such music"). Time of first publication, "March 28, 1869" (the time of publication of the piano arrangement by S.); and time of first representation, "March 10, 1869" (the time the opera itself was first played in Paris). The title of the copy of the piano arrangement deposited consisted of the title of the opera, with the addition of a statement as to the piano arrangement by S. No other mention of S. appeared in the registration. In August following, some separate instrumental parts of the opera were published, and no copy thereof delivered to the registration officers; but the rest remained unpublished. Subsequently, the defendant announced an opera in English, with the same name, music by O., and brought it out in London. The music as played was substantially as given in the arrangement by S. *Held*, reversing the decision of BACON, V.C., that the registration as made protected the opera, and the defendant was guilty of an infringement.—*Boosey v. Fairlie*, 7 Ch. D. 301.

**COSTS.**—See TRUST, 2.

**COVENANT.**

1. Plaintiff and another sold the defendant a lot of land, and in the deed defendant covenanted that no building to be erected upon the land should at any time "be used or occupied otherwise than as and for a private residence only, and not for the purposes of trade." The lot was one of several contiguous lots, all sold under deeds containing a like covenant; and on one lot the plaintiff himself had built a private residence. The defendant proposed to erect on his lot a building for the accommodation of one hundred girls, belonging to a charitable institution for missionaries' daughters, and supported by contributions. There was evidence that the plaintiff had permitted a small school to be kept in one of the other houses. *Held*, reversing the decision of BACON, V.C., that the defendant had violated the covenant, and that the permission for the school in the other house did not amount to a waiver by the plaintiff of the covenant in the defendant's case. Injunction granted.—*German v. Chapman*, 7 Ch. D. 271.

2. *Held*, that a covenant in a lease of a dwelling-house in London, not to assign without the consent of the lessor, was not a "usual covenant."—*Haines v. Burnett* (27 Beav. 500) considered overruled.—*Hampshire v. Wickens*, 7 Ch. 1. 555.

3. The assignee of a lease had notice of a restrictive covenant on the property binding upon his assignor. *Held*, that the covenant was binding on him in equity.—*Keppell v. Bailey* (2 My. & K. 517) considered overruled.—*Laker v. Dennis*, 7 Ch. 227.

4. The assignee of land on which there is a covenant is in exactly the same position as if he were a party to the covenant, in case he had notice of it.—*Richards v. Revitt*, 7 Ch. D. 224.

5. By an agreement for the purchase of a public house, the plaintiff agreed to assume the lease thereof at a rent named, "subject . . . to the performance of the covenants" therein, "such covenants being common and usual in leases of public-houses." The said lease contained the clause: "Provided always, and these presents are upon this express condition, that all underleases and deeds," made during the term, "shall be left with the solicitor

. . . of the ground landlord . . . for the purpose of registration by him, and a fee of one guinea paid to him" therefore. Then followed a provision for re-entry for breach or non-performance of any of the "covenants or other stipulations." The jury found this clause was not a "common and usual covenant."—*Held*, that the purchaser was not bound to specific performance, though the said clause might not be, in strictness a "covenant."—*Brooks v. Drysdale*, 3 C. P. D. 52.

See LEASE.

**COVERTURE.**—See CURTESY.

**CURTESY.**

By a will, freehold property was given to C's wife, as equitable tenant in tail, to her separate use, with restraint on alienation or anticipation of the rents and profits. C. was discharged in bankruptcy in 1865; and in 1873 the wife executed a disentailing deed, C. joining, and limited the estate to her separate use in fee. In 1876 she died, having devised her estates by will to her children. The assignee of C. applied for the rents, on the ground that C. had a life-interest as tenant by the curtesy, which had passed to the assignee.—*Held*, that C. had no curtesy, as his wife had disposed of the estate by will.—*Cooper v. Macdonald*, 7 Ch. D. 288.

**DAMAGES.**—See ANCIENT LIGHTS.

**DATE OF WILL.**—See WILL, 3.

**DEBT.**—See WILL, 3.

**DEED.**—See COVENANT, 1; SHELLEY'S CASE.

**DELIVERY.**—See VENDOR'S LIEN.

**DEVISE.**

1. A testator devised his real estate to trustees, their heirs and assigns, to hold to them for the use of B. for life, and afterwards to the use of such children of B. as should attain the age of twenty-one years. B. was directed to keep the premises in repair during his life. The trustees were empowered to apply the income of the portion of any infant devisee for his or her benefit during minority, or to pay the income over to such devisee's guardian, without responsibility for its application; and they were empowered to use the principal for the advancement of such infant before his attaining twenty-one, if they thought best. B. died leaving four children, one an infant. *Held*, that the trustees took a legal estate in the property; and, whether B.'s life-estate was legal or equitable, B.'s children took equitable estates, and, consequently, the infant's estate did not cease on B.'s death during his minority.—*Berry v. Berry*, 7 Ch. D. 657.

2. Devise to trustees, to the use of testator's son W. for life, and upon W.'s death without issue male to sell and pay the proceeds unto such one or more of testator's "children as might be living at the decease of his said son W., without male issue as aforesaid, and the issue of such of his said children as might be then dead, leaving issue," such issue to take *per stirpes* and not *per capita*. The testator died in 1840, and left W. and two other children living at his death. W. died in 1876 without issue. One of the other children died in 1872, having had two children, one of whom died in 1861, and the other is still living. On the question whether the child dying in 1861 before her parent took under the will, *held*, that the trust was an original gift, and said deceased child took according to the rule that

## DIGEST OF ENGLISH LAW REPORTS.

"the issue of children take without regard to the question whether they (the issue) do or do not survive the parent, if any issue survive the parent." *Dictum* of KINDERSLEY, V. C., in *Lanphier v. Buck* (2 Dr. & Sm. 499), disallowed. *In re Smith's Trusts*, 7 Ch. D. 665.

3. A testator devised copyholds held of the manors of Y., U., and I., to trustees, to the use of A. for life, remainder to the trustees to preserve contingent remainders, remainder to the use of A.'s children and their or his heirs, remainder to testator's grandson S. for life, remainder to the trustees to preserve contingent remainders, remainder to S.'s children, the plaintiffs. By a custom of the manors of Y., U., and I., the tenant can hold for life only, with power to nominate, by will or by deed, his successor or successors; and, if he nominates more than one, the survivor may nominate his successor. In a codicil, the testator, after stating that it had been found that his said copyhold estates were within the manors of U. and I., directed that the trustees should hold his said estates situated in those manors for the trusts of the will, so far as the customs of said manors would permit. But if the said customs forbade the "entails" made in the will, then the said A. and his nominees or successors should hold the said copyholds according to said customs. A. was admitted tenant of the copyhold of Y., and died without issue, having nominated the defendant B. his successor. The trustees were never admitted as tenants; one of them survived, and was made a defendant in the suit. *Held*, that under the will, the trustees, and not A., ought to have been admitted as tenants of the copyholds held of Y.; that the limitations in the will were equitable interests, and were valid; and that A., having been admitted as tenant, held only as *quasi* trustee for the parties beneficially interested, and that the defendant B. was accountable to the plaintiffs for the rents and profits of the copyhold of Y. since her admission thereto. *Allen v. Beesey*, 7 Ch. D. 453.

4. Devise of thirteen houses, a garden, and a pew in a church to testator's four sons, in equal shares, "to have and to hold subject to the following conditions: It is my will and desire" that the houses be not disposed of or divided without the consent of the four sons, their heirs or assigns; that the garden be sold, if necessary, to meet contingent expenses; that, "until the before-mentioned distribution is made," the income shall come into one fund, and be divided among the sons; that, if there should be no "lawful distribution" during the life of the sons, the property should go to their issue, and if any of the sons died without issue, such son's widow should have the income during widowhood, and afterwards "it" should "devolve" to the survivors of the other sons, i.e. to testator's grandchildren, their heirs and assigns, share and share alike. The four sons were made residuary legatees, absolutely. *Held*, that the sons were absolutely as tenants in common in fee, and the executory devise to the children was void. *Shaw v. Ford*, 7 Ch. D. 669.

DISCRETION.—See POWER.

DISTRIBUTION.—See PERPETUITY; WILL, 2.

## DOMICILE.

J. M., born in Scotland in 1820, went to New South Wales in 1837, and carried on the business of sheep farmer. In 1851, he bought land in Queensland, and lived there regularly

till four months after his marriage, in 1855. After a three years' visit to England, he lived three months on his land in Queensland, then three months at a hotel at Sydney, New South Wales; then in a house there, which he leased on a five years' lease. Then he built an expensive mansion-house at Sydney, in which his family resided till his death in 1866. He lived there, except when away in Queensland on business or political duties. He died suddenly in Queensland, and at his request was buried there. *Held*, that he had lost his Scotch domicile, and his domicile in Queensland, and at his death had his domicile in New South Wales.—*Platt v. Attorney-General of New South Wales*, 3 App. Cas. 336.

See MARRIAGE.

DORMANT PARTNER.—See PARTNERSHIP.

## EASEMENT.

Two houses, belonging respectively to plaintiff and defendant, had stood adjoining each other, but without a party-wall, for a hundred years. More than twenty years ago, the plaintiffs turned their house into a coach factory, by taking out the inside, and erecting a brick smoke-stack on the line of their land next the defendants, and into which they inserted iron girders for the support of the upper stories of the factory. In excavating for a new building on the site of the old one, which the defendants had removed, they left an insufficient support for the smoke-stack, and it toppled over, carrying the factory with it. The defendants were not guilty of negligence in excavating. *Held* (LUSH. J., diss.), that the defendants were not liable.—*Angus v. Dalton*, 3 Q. B. D. 85.

See ANCIENT LIGHTS.

EQUITABLE ESTATE.—See DEVISE, 1, 3.

ESTATE TAIL.—See COURTESY.

EVIDENCE.—See CONTRACT; NEGLIGENCE; WILL, 1.

EXCHANGE, BILL OF.—See BILLS AND NOTES.

EXECUTORY DEVISE.—See DEVISE, 1, 4.

FIRE INSURANCE.—See INSURANCE, 1.

## FIXTURES.

A trustee in bankruptcy executed a disclaimer of lease vested in the bankrupt. *Held*, that he was not entitled, months after the adjudication, to remove the tenant's fixtures, although he was in possession of the premises.—*Ex parte Stephens. In re Davies*, 7 Ch. D. 127.

FOREIGN EXCHANGE.—See BILLS AND NOTES, 5.

FRAUD.—See ANTICIPATION; TRUST, 2.

FREIGHT.—See RAILWAY.

## GUARANTY.

The wife of C., a retail trader, possessed of property in her own right, gave the plaintiff, with whom C. dealt, the following guaranty; "In consideration of your having, at my request, agreed to supply and furnish goods to C., I do hereby guarantee to you the sum of £500. This guaranty is to continue in force for the period of six years and no longer. *Held*, reversing the decision of FRY, J., that the guaranty did not cover sums due for goods supplied before its date, but was limited to goods sold after its date to the value of £500. *Morrell v. Cowan*, 7 Ch. D. 151; s. c. 6 Ch. D. 166; 12 Am. Law Rev. 501



## DIGEST OF ENGLISH LAW, REPORTS.

**HUSBAND AND WIFE.**—See COURTESY; GUARANTY; MARRIAGE.

**IMPLIED WARRANTY.**—See BILL OF LADING.

**INFANT.**

Agreement between the appellants and the respondent, an infant, was to work for appellants for five years, at certain weekly wages. There was a proviso, that if the appellants ceased to carry on their business, or found it necessary to reduce it, from their being unable to get materials, or from accident, or strikes, or combination of workmen, or from any cause out of their control, they could terminate the contract on fourteen days' notice. In an action on this agreement by appellants for loss of service, under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), *held*, that the agreement was not in itself inequitable, but its character depended upon whether its provisions were common in such labour contracts at that time, upon the condition of trade, and upon whether the wages were a fair compensation for the infant's services,—all which circumstances were necessary to the construing of the contract.—*Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

**INJUNCTION.**—See COVENANT, 1.

**INSURANCE.**

1. Plaintiff insured his house, worth £1,500, for £1,600. The Board of Works subsequently took the property under statutory power; the price had been agreed, and the abstract of title furnished and accepted, when a fire destroyed the house. *Held*, that the dealings between the Board and the plaintiff did not affect the contract, and the defendants must pay £1,500, the value of the house.—*Collingridge v. The Royal Exchange Assurance Corporation*, 3 Q. B. D. 173.

2. Two ships belonging to the same owner collided, and one of them sank and became a total loss. The owner paid into court the amount of tonnage liability in respect of the ship in fault, under the provisions of the Merchant Shipping Acts. The underwriters on the ship lost claim to be entitled to a portion of this, as they would have been had the ships belonged to different parties. *Held*, that their right in such case existed only through the owner of the ship insured, and not independently, and as he could not sue himself, they could not recover.—*Simpson v. Thompson*, 3 App. Cas. 259.

**INTENTION.**—See DOMICILE.

**ISSUE.**—See DEVISE.

**JURISDICTION.**—See MORTGAGE.

**JURY.**—See BILL OF LADING; NEGLIGENCE.

**LANDLORD AND TENANT.**—See FIXTURES.

**LEASE.**—See BEQUEST.

**LEASE.**

Plaintiff became the owner of a lease of two farms, at a rent of £310 per annum. The lease contained, *inter alia*, a covenant on the part of the lessee not to mow meadow-land more than once a year, and not to underlet any part of the premises without the consent in writing of the lessor; but such consent was not to be withheld if the proposed sub-lessee was a respectable and responsible person. It was provided, that, if the lessee should wilfully fail to perform the covenants, or if he should become

bankrupt, or make a composition with his creditors, or if execution should issue against him, the lessor might re-enter. Eight years before the expiration of the lease, plaintiff entered into negotiations with the defendant, a respectable and responsible person, for an underlease of one of the farms, on the terms under which he himself held it; and he stated that he paid £220 rent for it. An arrangement was made, accordingly, by which defendant was to have possession June 24. Before that time, defendant's solicitors had objected to the above provisions in the original lease, and had noted the same on the margin of a draft lease sent them by plaintiff's solicitors, in pursuance of the arrangement between plaintiff and defendant. They suggested a modification of the original lease. They did not object that plaintiff held no separate lease for the farm at the rent which he stated he paid. While the negotiations were pending, defendant, on June 24, took possession. Subsequently, the modifications not being procured, defendant refused the lease; and, in an action for specific performance, or for damages, it was *held* that taking possession was only evidence of a waiver of objection to the title, and could be rebutted; that, by not noting objection to the plaintiff's holding no separate lease at £220 rent, defendant had waived that; that if the sub-lessee was a respectable and responsible person, the written consent of the lessor to the sub-lessee was unnecessary; that the covenant against mowing meadow-land more than once a year was not an unusual covenant; but that the provision for re-entry on bankruptcy, &c., of the lessee was unusual, and the defendant was not bound to specific performance, nor liable in damages.—*Hyde v. Warden*, 3 Ex. D. 72.

See COVENANT, 2, 3; SPECIFIC PERFORMANCE, 1, 2.

**LEGACY.**—See BEQUEST.

**LIEN.**—See ATTORNEY AND CLIENT, 2; VENDOR'S LIEN.

**LIFE-ESTATE.**—See DEVISE, 4.

**LIMITATION OF LIABILITY.**—See COMMON CARRIERS.

**LOAN.**—See PARTNERSHIP.

**MARINE INSURANCE.**—See INSURANCE, 2.

**MARKET.**—See SALE.

**MARRIAGE.**

B. and S., Portuguese subjects and first cousins, went through the form of marriage in 1864 in London, in accordance with the requirements of English law. Subsequently they both returned to Portugal, and have never lived together. By the law of Portugal, marriages between first cousins are null and void; but the Pope may grant a special dispensation which legalizes such a marriage. *Held*, reversing the decision of Sir R. PHILLIMORE, that a petition for nullity of the marriage ought to be granted.—*Sottomayor v. De Barros*, 3 P. D. 1; s. c. 2 P. D. 81; 12 Am. Law Rev. 99.

**MARRIED WOMEN;**—See ANTICIPATION; COURT-EST.

**MEASURE OF DAMAGES.**—See ANCIENT LIGHTS.

**MISREPRESENTATION.**—See VENDOR AND PURCHASER.

**MISTAKE.**—See SPECIFIC PERFORMANCE.

## DIGEST OF ENGLISH LAW REPORTS.

**MORTGAGE.**

A company, with power to issue "debenture bonds" and "mortgage bonds," having an office in London, and owning land in Florence, issued "obligations," binding themselves, their successors, and all their estate and property, to pay the bearer the sum stated on their face, with interest, in eight years; but reserving the right to call in a certain number of them each year by lot. The company afterwards duly mortgaged its property in Florence, in the Italian form, to a London bank, with notice of the issue of the "obligations." On breach of this mortgage, the mortgagees began proceedings at Florence, and got an order to sell. The plaintiff, holder of some of the "obligations," applied for an injunction to restrain the sale. *Held*, that it was contrary to comity for the court to interfere while proceedings were going on in Florence; also, that the "obligations" were not mortgages, but only bonds, and constituted no claim on the land in Florence as against the mortgagee.—*Norton v. Florence Land & Public Works Co.*, 7 Ch. D. 332.

See ATTORNEY AND CLIENT, 2.

**MORTMAIN.**

A testator bequeathed the sum of £3,000 to the corporation of T., directing £1,000 to be laid out "in the erection of a dispensary building, which is so urgently needed there," and the remaining £2,000 to be held "as an endowment fund for the said dispensary." The corporation already held lands in mortmain, upon which it could legally build a dispensary. *Held*, that the bequest was void under 9 Geo. II. c. 36, as not expressly prohibiting the purchase of land for the dispensary.—*In re Cox. Cox v. Davie*, 7 Ch. 204.

**NEGLECTANCE.**

Respondent was a third-class passenger on appellant's underground railway, and at the G. station three persons got in and stood up, the seats in the compartment being already full. The respondent objected to their getting in; but there was no evidence that appellant's servants were aware of it, and there was evidence tending to show that there was no guard or porter present at the G. station. At the next station, the door was opened and shut, but there was no evidence by whom. Just as the train was starting, there was a rush by persons trying to get in; the door was thrown open; the respondent partly rose to keep the people out; the train started, and he was pitched forward, and caught with his hand by the door-hinges to save himself; a porter pushed the people away just as the train was entering the tunnel, and slammed the door to, and thereby respondent's thumb was caught and injured. *Held*, reversing the decision of the Common Pleas and of the Court of Appeal, that there was no evidence that the injury was occasioned by the negligence of the appellant sufficient to go to the jury. It is a question of law for the court to say whether there is any evidence of negligence occasioning the injury to go to the jury. It is a question of fact for the jury to say what weight shall be given to the evidence submitted to them. *Brydges v. The North London Railway Co.* (L. R. 7 H. L. 213) construed.—*The Metropolitan Railway Co. v. Jackson*, 3 App. Cas 193; s. c. L. R. 10 C. P. 49; 2 C. P. D. 125; 9 Am. Law. Rev. 713; 12 id. 100.

See SHIPPING AND ADMIRALTY.

NEXT OF KIN.—See WILL, 2.

NOTICE.—See BILLS AND NOTES, 4; COVENANT, 3, 4.

NULLITY.—See MARRIAGE.

OFFICIAL.—See PATENT.

ORIGINAL GIFT.—See DEVISE, 2.

PAROL EVIDENCE.—See WILL, 1.

**PARTNERSHIP.**

Partnership articles were entered into by M. and S., reciting that, under section 1 of Bovill's Act (28 & 29 Vict. c. 86), D. had agreed to lend them £10,000, to be invested in the business, subject to the following provisions, *inter alia*, agreed to by all the parties: The capital of the firm is to consist of said £10,000, and such other sums as shall be advanced by any of the parties,—all to bear interest at 5 per cent; said £10,000 is advanced as a loan by D. under said section of Bovill's Act, and does not, and shall not, render D. a partner; M. or S. only shall sign the firm name; D. shall receive an account-current at the end of each year, and be at liberty to examine the books at any time; an inventory shall be taken yearly, and the net profit or loss divided, in the proportion of 25 per cent. to D., and 37½ per cent. each to M. and S. In case of the death of either M. or S., the business may continue, and the share of profits of the deceased partner shall be divided *pro rata* between D. and the other; D. may dissolve the partnership in case his original capital of £10,000 be reduced more than one-half by losses, or on the death of a partner, and D. may demand for himself liquidation of the business. On the death of D., his representatives shall not withdraw any of his capital until the termination of the present contract; D. may substitute any other person into his rights; and M. and S. have the same option with D., "by reimbursing him his capital and interest." Under this agreement, D. advanced at different times about £6,000 more. On the bankruptcy of the firm, *held*, that D. was a partner, and could not prove as a general creditor. *Ex parte Delhasse. In re Meyerand*, 7 Ch. D. 511.

**PATENT.**

Three referees were appointed, under an Act of Parliament, to inquire into the impurities of the London gas, with the right to require the gas companies to afford them facilities for their investigations. As a result of their examination, the plaintiff, one of the referees, thought he had discovered a method of securing greater purity in the gas. The requisite change in the process of manufacture was suggested to the defendant company by the referees, and the company tried it, with success. The referees made their report, incorporating these suggestions and experiments; but the report was withheld from publication for a few days, in order to enable the plaintiff to get out a patent for his discovery. *Held*, that when the knowledge acquired by the plaintiff in the course of his official investigation was communicated to the other members of the official board, it became public property at once, and the other members of the board had no power to consider the information confidential.—*Patterson v. The Gas Light & Coke Co.*, 3 App. Cas. 239; s. c. 2 Ch. D. 812.

PERIOD TO ASCERTAIN CLASS.—See PERPETUITY, WILL, 2.

## DIGEST OF ENGLISH LAW REPORTS.

**PERPETUITY.**

Bequest of two hundred and forty shares railway stock, and four-sevenths of the residue of testatrix' property to trustees, in trust to accumulate the income until twelve months after the death of B., and then for such of B.'s four children as should be living at the expiration of said twelve months, "and the issue then living, and who shall attain the age of twenty-one years or marry, of any of the said children who shall have died," absolutely. *Held*, that the bequests were void, as contrary to the rule against perpetuities. The gift was to a class the members of which might not be ascertained within twenty-one years from the death of B.—*Bentinck v. Duke of Portland*, 7 Ch. D. 693.

**PLEADING AND PRACTICE.**—See NEGLIGENCE.

**POWER.**

Power given to trustees under a will to appoint to the husband of testator's daughter, in case she should marry with their approbation, the income of the daughter's property after her death, during his life, or such part as the trustees should think proper. The daughter married before the testator's death, and with his consent. The trustees had, at the daughter's death made no formal approval of the marriage, and made no appointment. *Held*, that the husband was entitled to a life-interest in the property.—*Tweeddale v. Tweeddale*, 7 Ch. 633.

See APPOINTMENT.

**PRECATORY TRUST.**—See TRUST, 1.

**PRINCIPAL AND AGENT.**

It was the custom of the defendant, through his agent S., in the usual course of business, to make certain advances on goods shipped by third parties, and to draw on the plaintiff for the amount so advanced. In course of business, S., as agent, rendered a final account to the plaintiff, and in it charged plaintiff with certain advances, which it turned out afterwards had never been made. He then drew on the plaintiff for the amount, received the money, and appropriated the amount falsely charged, to his own use. *Held*, that the plaintiff could recover the amount from the defendant.—*Swire et al v. Francis*, 3 App. Cas. 106.

See FACTOR.

**PRIORITY.**—See ATTORNEY AND CLIENT, 2.

**PROFITS AND LOSSES.**—See PARTNERSHIP.

**PROMISSORY NOTE.**—See BILLS AND NOTES, 2, 4.

**PROTEST.**—See BILLS AND NOTES, 5.

**PUBLICATION.**—See PATENT.

**RAILWAY.**

By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31, § 2), railway companies are forbidden to "give any undue or unreasonable preference or advantage to or in favour of any particular person or company," in the matter of carrying and forwarding freight. Plaintiff had a brewery at B., where there were three other breweries. The latter were connected with the M. railway; plaintiff's was not. In order to get some of the freight from the three breweries away from the M. Railway, the defendant railway carried their goods from the breweries to their freight depot free of charge, and still made a profit on the whole transportation. They made a charge to the plaintiff

for the same service. *Held*, that this was an "undue preference" within the Act, and the plaintiff could recover an amount equal to the cost of carting his goods to defendant's depot.—*Evered v. The London & North-Western Railway Co.*, 3 Q. B. D. 134; s. c. 2 Q. B. D. 254.

See NEGLIGENCE.

**RE-EXCHANGE.**—See BILLS AND NOTES, 5.

**SALE.**

A man brought into market pigs from his infected herd, out of which many had died, and had them sold, stating that they were to be taken with all faults. *Held*, that he was not liable in damages to the buyer on whose hands the pigs died.—*Ward v. Hobbs*, 3 Q. B. D. 150; s. c. 2 Q. B. D. 331; 12 Am. Law Rev. 104.

See VENDOR AND PURCHASER; VENDOR'S LIEN.

**SEAWORTHINESS.**—See BILL OF LADING.

**SEPARATE USE.**—See ANTICIPATION; CURTESY; TRUST, 1.

**SETTLEMENT.**—See APPOINTMENT.

**SHELLEY'S CASE.**

The rule in Shelley's Case applies as well to wills as to deeds.—*In re White & Hindle's Contract*, 7 Ch. D. 201.

**SHIPPING.**

L. duly registered as "managing owner" of a sloop, trading with her for some time, employing E. as captain, and paying him regular wages. A verbal agreement was then made between them that E. should take the ship where he chose, engage the men, and render accounts from time to time to L.; and L. was to have one-third of the net profits. While this agreement was in force, and while the sloop was discharging a cargo under a charter-party, expressed to be between the charterers and E., "master, for and on behalf of the owners" of the sloop, she, through the negligence of E., caused damage to the plaintiff's ship. *Held*, that L. was responsible, as well as E., for the negligence of E.—*Steel v. Lester & Lile*, 3 C. P. D. 121.

See BILL OF LADING.

**SOLICITOR.**—See ATTORNEY AND CLIENT.

**SPECIFIC BEQUEST.**—See BEQUEST.

**SPECIFIC PERFORMANCE.**

1. Defendant agreed to purchase the lease of a house, "subject to the approval of the title" by his solicitor. *Held*, that disapproval of the title, on reasonable grounds and in good faith, by the purchaser's solicitor, released the purchaser from the obligation to specific performance. The stipulation is different from that employed in a usual contract to purchase, that the vendor shall make a good title.—*Hudson v. Buck*; 7 Ch. D. 683.

2. Plaintiff made a tender for the lease of a farm at £500 rental, mentioning the farm by name, and two different lots, which he meant to include in it, which amounted in all to about 250 acres. Defendant's agent did not look to see what lots were specified in the plaintiff's offer, but took it for granted that they were the same as those specified in another offer from one A., which he had just before opened, that being an offer for said farm, excluding one of said lots, and thus containing

## DIGEST OF ENGLISH LAW REPORTS.

about 235 acres. The agent also said that he intended to let the said farm as containing 214 acres only, that being the quantity it contained, excluding the two additional lots; and he offered to grant a lease of 214 acres at £500 rent. the other two lots having been already let to other parties. *Held*, that a lease for 214 acres should be granted at a rent reduced from £500, in the proportion of 214 to 235.—*McKenzie v. Hesket*, 7 Ch. D. 675.

See COVENANT, 5; LEASE.

STATUTE.—See CONSTRUCTION, 1, 2.

SUB-LEASE.—See LEASE.

TRAMWAY.—See CONTRACT.

## TRUST.

1. A testatrix left her property to her sister, and attached to it a precatory trust that the latter should leave it to K.'s "children, John, Sophia, and Mary Ann." *Held*, that in executing the trust, the sister could limit the shares of the daughters to their separate use.—*Willis v. Kymer*, 7 Ch. D. 181.

2. A sale and adjustment of a testator's property was made by trustees, under a decree of court, and years afterwards some of the residuary legatees, being minors, brought a bill by their next friend to have the sale set aside, on the ground that the adjustment was improper, and brought about by the fraud of one of the trustees. The bill was dismissed on its merits. *Held*, that as the minors' next friend could not respond in costs, the trustee charged with fraud, who appeared and defended, was entitled to costs out of the estate, as he had defended that, as well as his own character.—*Walters v. Woodbridge*, 7 Ch. D. 504.

3. Two trustees advanced money to A., a builder, on security of land purchased by A. of B., the defendant and one of the trustees, and which A. had built upon. The money was used partly to pay for the land, and partly to repay other sums which A. owed B. The plaintiff, the other trustee, knew that A. and B. had had business relations. A. went into bankruptcy; and the plaintiff filed a bill against B., his co-trustee, alleging that the security was insufficient, and asking that the property be sold, and that the defendant be held to make up the deficiency. Refused.—*Butler v. Butler*, 7 Ch. D. 116; s.c. 5 Ch. 554.

See DEVISE, 1, 3; POWER.

UNDERWRITER.—See INSURANCE, 2.

## VENDOR AND PURCHASER.

The plaintiff purchased a piece of property, had the title examined by his solicitor, was advised that it was good, and completed the purchase. He subsequently discovered that certain parties were entitled to the flow of water through an underground culvert, the existence of which he was not informed of, and had not discovered in examining the title. *Held*, that after the execution of the conveyance, and completion of the purchase, he could not obtain compensation for such defect.—*Manson v. Thacker*, 7 Ch. D. 620.

See COMPOSITION; COVENANT, 5; SPECIFIC PERFORMANCE, 1.

## VENDOR'S LIEN.

The respondents purchased of the appellants, at various times between Feb. 13 and June 1, 1876, parcels of tea imported by the latter, and lying in a bonded warehouse kept

by them. At each transaction, a warehouse warrant, endorsed in blank, was given the purchasers by the appellants, stating that the tea had been warehoused by the appellants Jan. 1, 1876. Subsequently the appellants added to the blank endorsements the name of the respondents, thus making the goods deliverable to the respondents' order alone. Warehouse rent was charged by the appellants from Jan. 1, 1876, to the delivery of each lot, and paid by the respondents. The latter having become bankrupt before their notes given for the tea were paid, the appellants claimed a vendor's lien on the tea sold to the respondents and remaining in their warehouse. *Held*, that there had been no delivery, and the lien was good.—*Grice v. Richardson*, 3 App. Cas. 319.

VESTED INTEREST.—See WILL, 5.

WAIVER.—See COVENANT, 1. LEASE.

WAREHOUSEMAN.—See VENDOR'S LIEN.

WARRANTY.—See BILL OF LADING.

## WILL.

1. A testator left £600 to the children of his daughter by any other husband than "Mr. Thomas Fisher of Bridge Street, Bath." At the date of the will there was a Thomas Fisher living in Bridge street, Bath, who was married and had a son, Henry Tom Fisher, who sometimes lived with his father, and who had paid his addresses to the daughter, and, after the testator's death, married her. On the question whether their child was entitled to the £600, *held*, that evidence of the above facts was admissible to show who was meant by the testator.—*In re Wolverton Mortgaged Estates*, 7 Ch. D. 197.

2. C., by will, gave £12,000 in trust for his four daughters; as to £3,000 thereof to his daughter S. for life, and at her death to her children then living. If she left no child, the income was to be paid to the other daughters then living, and to the survivor or survivors; and, after the decease of the last surviving daughter, the £3,000 to be paid to the child or children of such last surviving daughter, and if there were no such children, the same was to "be paid to such persons as will then be entitled to receive the same as my next of kin," under the Statute of Distributions. A similar provision was made as to the share of each of the other daughters. S. died leaving issue. The other three daughters subsequently died without issue. On the application of the personal representative of the last survivor, *held*, reversing decision of BACON, V. C., that the time to ascertain the class of next of kin was the death of the testator, not the death of the last surviving daughter.—*Mortimer v. Slater*, 7 Ch. D. 322.

A testator recited that his son had become indebted to himself in various amounts, describing them, and bequeathed to the son said amounts, and released him from payment thereof, and of "all other moneys due from him to" the testator. By a codicil, he released to the son another sum, which the son had misappropriated after the date of the will. At the testator's death the son was indebted to him in other sums incurred after the date of the codicil. *Held*, reversing the decision of MALINS, V. C., that the will must speak from the testator's death, and the release applied to all debts incurred before that time. *Everett v.*

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

*Everett*, 7 Ch. D. 428; s. c. 6 Ch. D. 122; 12 Am. Law Rev. 513.

4. Testator left his property in trust for his children, the shares of the sons to be paid them at the age of twenty-five, those of the daughters to be settled to their separate use for life, remainder in trust for their issue. Then followed this clause: "And in case of the death of my said daughters or of any of my sons before they shall attain their respective ages of twenty-five years, or of such of them as shall not have received his or their share or respective shares of and in my estate, for the reasons aforesaid, without lawful issue, or having such, and they shall happen to die, being a son or sons, before he or they shall have attained the age of twenty-five years, or being a daughter or daughters, before the age of twenty-one years or marriage, then and in such case I do hereby will and direct that the share or shares of him, her, or them so dying shall go and be divided equally between my surviving children, and be paid to them or applied to their uses in such manner as his or their original shares are hereby directed to be paid and applied, . . . according to the true intent and meaning of my will." The testator left three sons who attained the age of twenty-five, and three daughters, who all married and attained to the age of twenty-five. Two daughters died, leaving issue still living. One son died unmarried, and one leaving issue still living; then the third daughter died without issue, and finally the third brother died. On a petition for the payment of the share of the third daughter to the persons entitled, *held*, reversing the decision of the Master of the Rolls, that "surviving children" meant "other children," and that the share in question was to be divided into fifths, and paid, one-fifth each, to the issue or personal representatives of the two sisters and three brothers of the deceased.—*Lucena v. Lucena*, 7 Ch. D. 255.

5. A testator directed his trustees to hold a fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of the daughter or daughters at that age or marriage." *Held*, that these interests were at the testator's death vested, though subject to be divested in certain events.—*Armtyage v. Wilkinson*, 3 App. Cas. 355.

See APPOINTMENT; BEQUEST; DEVISE, 1, 2, 3, 4; MORTMAIN; PERPETUITY; POWER; SHELLEY'S CASE; TRUST, 1.

## WORDS.

- "Do, Permit, Suffer."—See ANCIENT LIGHTS.  
 "Just and Reasonable."—See COMMON CARRIER.  
 "Leaving Issue."—See DEVISE, 2.  
 "Obligations."—See MORTGAGE.  
 "On, At and From."—See CONSTRUCTION, 1.  
 "Paintings."—See CONSTRUCTION, 2.  
 "Private Residence."—See COVENANT, 1.  
 "Surviving Children."—See WILL, 4.  
 "Undue Preference."—See RAILWAY.  
 "Vested."—See WILL, 5.

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

## INTERMEDIATE EXAMINATIONS: TRINITY TERM, 1878.

## FIRST INTERMEDIATE.

*Smith's Common Law—Con. Stats. U. C. Caps. 42 & 44, and Amendments.*

1. Define "Mayhem." When is it excusable?
2. In how far is the utterer of a mere repetition of a slander liable, when he is not the author of the scandal? Would such repetition make any difference in the liability of the original utterer, and if so, under what circumstances?
3. What is the meaning of the technical term "parol contract"?
4. Under what circumstances can a distress for rent be made upon land in respect of which the rent is not payable and not included in the demise?
5. Sketch shortly, as laid down by Mr. Smith, the duties and liabilities of a Solicitor to his client?
6. What is necessary to constitute a binding acceptance of a bill of exchange? Give reasons for your answer.
7. Under what circumstances will a person making a representation as to the credit of another be liable on such representation? Give reasons for your answer.

## WILLIAMS ON REAL PROPERTY.

1. A testator, by his will, devises real estate to the unborn son of A.B., and after the decease of such unborn son to his sons in tail. What estate does the unborn son take? What rule is infringed by the devise, and what doctrine applies to the case?
2. What do you understand by the term, "words of limitation," as applied to certain words in a conveyance?
3. Explain the nature and extent of an estate in dower.
4. A testator, by his will, declared his intention to be that his son should not sell or dispose of his estate for longer time than his life, and to that intent he devised the same to his son for life, and after his decease to the heirs of the body of the said son. Give the effect of this devise, with your reasons.

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

5. What covenants are usually given in a conveyance from vendor to purchaser?

6. What do you understand by the proposition that there cannot be a use upon a use?

7. What do you understand by "restraint upon anticipation" in a conveyance to the separate use of a married woman.

## SECOND INTERMEDIATE.

*Leith's Blackstone—Greenwood on Conveyancing.*

1. What is the technical meaning of the term "purchaser?" A. makes a gift of lands to B. Is the latter a purchaser? Explain.

2. Upon what principal does land escheat?

3. What do you understand by the operative words in a conveyance? Exemplify your meaning by reference to a conveyance in fee.

4. A. grants land to B., giving certain covenants for title. Afterwards, by agreement, the deed is destroyed and the bargain cancelled. What effect has this upon the legal estate in the lands and the covenants in the deed?

5. What are sufficient acts of part performance to take an agreement for a lease out of the operation of the Statute of Frauds?

6. Has the word *demise* any, and if so, what implied signification?

7. What is the practice between conveyancers in carrying out a contract for the sale and purchase of lands?

## CERTIFICATE OF FITNESS.

*Smith on Contracts—The Statute Law.*

1. Give the classes into which contracts are divided by the Common Law of England, with an example of each class.

2. State fully the peculiarities of a contract by deed noticed by Mr. Smith.

3. What are the two great differences between written contracts not under seal and verbal contracts? Illustrate your answer by examples.

4. A. agrees verbally with B. that if B. will take possession of a house upon its being properly furnished, A. will furnish it properly. Can this agreement be enforced? Give reasons for your answer.

5. What difference is there as to capability of being enforced between (a) a verbal lease for a year, and (b) an agreement for such lease? and what are the grounds of the distinction?

6. In what cases of contract will the law imply a request?

7. A. agrees with B. to pay him \$100 for assisting him, A., with a robbery, and pays over the money. B. refuses to assist him. Can A. recover the money back again? What is the general rule of which this case is an example, and what are the exceptions to such rule?

8. Will a verbal agreement for the sale of shares in a joint stock company which is seized of land as part of its assets be binding, and why?

9. What is the effect on a power of attorney of the death of the person granting the power? Can this effect be avoided in any way, and if so, how? State the provisions of any statutory enactment relating to the subject.

10. State fully, giving the grounds for your answer, the extent to which the laws of England affect the laws of property in the Province of Ontario.

*Smith's Mercantile Law, the Statute Law, Common Law Pleading and Practice.*

1. State the exceptions, given by Mr. Smith, to the general rule that one partner cannot sue another at law.

2. A., a member of a co-partnership borrows from B. \$1000 on his own credit, and the money the proceeds of the loan is applied to the use of A.'s firm. What remedy, if any, will B. have for the recovery of his loan, (a) against A., (b) against A.'s firm? Explain fully your answer.

3. Where a partner fraudulently gives the bill of the firm for his own debt; what remedy, if any, has the firm for the recovery back of the bill from the party fraudulently receiving it? Give reasons for your answer.

4. What is an *inland* and what a *foreign* bill? What is the necessity or use of protest in regard to each?

5. What is meant by *abandonment* in connection with maritime insurance? What is the effect of it? and what necessity is there for notice in regard to it? Explain your answer.

6. How is the authority of the master to hypothecate the ship in furtherance of the voyage in which he is engaged, limited?

7. "Where a surety has entered into a bond for payment in default of the principal debtor, and by parol agreement time has been given to the principal debtor, the surety is compelled to resort to a Court of Equity." On what reasons is the above assertion of Mr. Smith founded? Is the

## CORRESPONDENCE.

assertion now true according to the law of Ontario? Give reasons for your answer.

8. State the manner in which the right of stoppage *in transitu* is exercised.

9. Give a short account of the manner in which the remedy by way of interpleader is pursued in Common Law courts and the various circumstances in relation to which the remedy is applicable.

10. Give a short sketch of the proceedings in a case under the Overholding Tenants' Act indicating the way of proceeding to have the judgment of the Court of first instance in such cases reviewed.

## CALL TO THE BAR.

*Byes on Bills—Stephen on Pleading—Common Law Pleading and Practice.*

1. What are "letters of credit" and circular notes," and what is the legal effect of the issue of such?

2. State accurately the circumstances under which the vitiation by fraud of the consideration for a bill will be a defence to an action on a bill.

3. A bill is endorsed conditionally so as to impose on the drawee, who afterwards accepts, a liability to pay the bill to the endorsee or his transferees in a particular event only. The bill is passed through several hands between endorsement and acceptance and is finally paid by the acceptor before the condition is satisfied. How will this affect the liability of the acceptor to the payee?

4. What is the effect of a material alteration of a bill by an endorsee (a) on his rights against prior parties on the bill, (b) on his rights against his endorser, (c) on the rights of a subsequent *bond fide* transferee for value?

5. Sketch briefly the history of the action of *ejectment* tracing it from its origin to its present form.

6. In cases tried at *Nisi Prius*, with a jury, where the Judge either does not wish, or is not required by the parties, to give his opinion on points of law raised at the trial, what are the different courses referred to by Mr. Stephen which may be pursued for determining such questions of law? Give any recent statutory enactments tending to facilitate such cases.

7. How should an *es'oppel* be set up (a) when it appears on the face of the adverse pleading, (b) when it does not so appear? Answer fully.

8. "It is not necessary to state matter of which the Court takes notice *ex officio*." Explain and illustrate this rule.

9. What right of peremptory challenge of jurors have parties in a civil action? Give authority for your answer.

10. State briefly the practice in relation to the examination of parties to Common Law actions before trial. What provision is there as to the use in evidence of depositions so taken?

## CORRESPONDENCE.

*Interest on notes after maturity.*

To the Editor of CANADA LAW JOURNAL.

SIR,—In the reference made by you in the September number of the LAW JOURNAL to the recent decision of the Supreme Court of Maine, holding that interest is not recoverable after maturity on a note at the rate (more than the legal rate) specified in it, when nothing is said as to the rate after maturity, you have not mentioned the case of *Dalby v. Humphrey*, 37 U. C. R. 514. This is a more recent decision than any of the cases in the Common Pleas and holds in opposition to them, and in accordance with *Cook v. Fowler*, L. R. 7 H. L. 29, that, where a day is named for payment of a note with interest at a rate specified, the claim for interest after that day is a claim for damages for breach of the contract, not as upon an implied contract, and is in the discretion of the Court or Jury; and in that case the Court only allowed six per cent. per annum, although the note was payable with interest at the rate of two per cent. per month.

If it is law that there is no implied contract to pay (after maturity of the note) the rate of interest specified in it, it is difficult to see upon what principle any other rate than that established by law—viz., six per cent., can be allowed.

If this is not admitted, but it has to be decided by a Judge or Jury in each case how much shall be allowed, upon what principle is the Clerk of the Court to compute interest when signing judg-

## FLOTSAM AND JETSAM.

ment for want of appearance to a specially endorsed writ, where such a note is the claim sued for. It has been the custom to compute the interest at the rate specified in the note. This is clearly opposed to *Dalby v. Humphrey*—and what principle is left for the Clerk to act upon except to compute at the legal rate—viz., six per cent. ?

Of course, if it must be left to a Judge or Jury to decide in each case, the claim would be (in part at least) an unliquidated one, and no judgment by default could be signed upon it.

Yours, &c.,

COUNTY JUDGE.

[We are inclined to quote the proverb, "Hard cases make bad law." *Cook v. Fowler* must, we suppose, be accepted as final. *Dalby v. Humphrey* follows it without even referring to the cases in our Court of Common Pleas, which, we must confess, seem to us more in accordance with sound principles. In both cases there was an evident desire to help the defendants out of what the Courts thought were unconscionable bargains. They, therefore, made new bargains not contemplated by either party. The argument in *Cook v. Fowler* was that while it might be reasonable under some circumstances, and the debtor might be very willing to pay five per cent. per month for a short time, it would not follow that he would be willing to pay at the same rate if he should not be able to pay until some time after he had promised. Very probably not, but we venture to assert that there never was a case, apart from the usury laws, where the debtor promised to pay the high rate of interest but what both he and the creditor entered into the arrangement under the full belief that the same rate would be recoverable until payment should be made;—in fact, they would very reasonably suppose that there was

a contract to pay the rate mentioned in the note until it should in some way be settled. Doubtless the money would not have been lent, or the note would not have been taken, if the promisee had thought otherwise. One inconvenience of the rule as it now stands appears in the case suggested by our correspondent. We are not prepared at present to express any opinion as to what course Clerks should adopt under the circumstances referred to. Much might depend upon the way of stating the claim for interest on the special endorsement.—EDS. L. J.]

## FLOTSAM AND JETSAM.

The practice of our judges in putting on a black cap when they condemn a criminal to death will be found, on consideration, to have a deep and sad significance. Covering the head was, in ancient days, a sign of mourning. "Haman hasted to his house, mourning, having his head covered." (Esth. vi., 12). In like manner, Demosthenes, when insulted by the populace, went home with his head covered. "And David . . . wept as he went up, and had his head covered: . . . and all the people that was with him, covered every man his head, and they went up, weeping as they went up" (2 Sam. xv. 30). Darius, too, covered his on learning the death of his Queen.

But, among ourselves, we find traces of similar mode of expressing grief, at funerals. The mourners had a hood "drawn over the head" (Fostbroke, Encyc. of Antiq., p. 951). Indeed the hood drawn forward thus over the head is still part of the mourning habiliment of females, when they follow the corpse. And with this it should be borne in mind that, as far back as the time of Chaucer, the usual colour of mourning was black. Atropos, also, who held the fatal scissors which cut short the life of man, was clothed in black.

When, therefore, the Judge puts on the black cap, it is a very significant as well as solemn procedure. He puts on mourning, for he is to pronounce the forfeit of a life. And, accordingly, the act itself, the putting on of the black cap, is generally understood to be significant. It intimates that the Judge is about to pronounce no merely registered supposititious sentence; in the very formula of condemnation he has put himself in mourning for the convicted cul-



## FLOTSAM AND JETSAM.

prit, as for a dead man. The criminal is then left for execution, and unless mercy exerts its sovereign prerogative, suffers the sentence of this law. The mourning cap expressly indicates his doom.—*Notes and Queries.*

The observations made by Lord Justice James, in the case of *Dean v. M'Dowell* (38 L. T. Rp. N. S. 864) are a sad reflection upon the average quality and utility of legal text-books. Counsel engaged in the case were labouring to show that if profits have been made by a partner in violation of his covenant not to engage in any other business, the profits will be decreed to belong to the partnership. In support of this proposition a case decided by Lord Eldon was first quoted. Then came a quotation from Story's Equity Jurisprudence fully supporting the affirmative; then a quotation from Collyer on partnerships to the same effect, and the learned counsel was about to make a further reference to Bissett on Partnership, when the Lord Justice interrupted by remarking, "It is of no use to quote the text writers. They all copy from one another, and give as their only authorities that case which is really no authority for the principle they lay down." However severely these remarks may seem to reflect upon the legal text writers generally, no person who is conversant with law books can doubt that too great justification for the stricture of the learned judge does undoubtedly exist. Fortunately, however, there is observable an improvement in the character of our text-books, and text writers are showing a greater freedom from the trammels of previous writers than was previously the case, and it may be safely said that the number of legal works which indicate both originality and ability is on the increase. Two learned judges now on the bench, to say nothing of other writers, have themselves shown by their treatment, the one of the Law of Partnership, the other by his work on the Contract of Sale, what a legal text-book ought to be.—*Law Times.*

The opinion of the Supreme Judicial Court of Massachusetts has just been filed in the case of *Locke v. Lewis*, which presents an interesting phase of the law of partnership. It was an action of replevin for three carriages. It appeared by the evidence that, in September, 1870, a co-partnership previously existing between the plaintiff and I. R. and D. R. in the business of manufacturing carriages at Nashua, in the State of New Hampshire, was dissolved, the plaintiff left the firm, and I. R. and D. R. gave him their promissory note

for the balance of his unpaid interest therein, and formed a new firm under the style of I. R. & Son, and continued the business at the same place. In October, 1870, I. R. and D. R. formed a limited partnership, under the laws of New Hampshire, under the name of I. R. & Co., with C. P. and G., in which I. R. and D. R. were general partners, and the other three were special partners. In February, 1871, I. R. and D. R. sold the carriages in question to the plaintiff in payment of their note to him, and he gave up the note to them. The plaintiff testified to the effect that he bought the carriages in good faith; that he thought two of them were the same that the old firm had on hand when he sold out to I. R. and D. R., and that he did not know that the limited partnership existed, or was carrying on business, or that any one but I. R. and D. R. had any interest in the carriages sold to him. The defendant, a deputy sheriff, afterwards attached the carriages on *mesne* process against all the partners in the limited partnership. The report assumes that the carriages were part of the stock in trade of this partnership; and the single question reserved for the decision of the court was the correctness of the ruling under which a verdict was ordered for the defendant, and which was, in substance, that the sale by the two general partners, in payment of their own debts, of goods which were in fact goods of the partnership, but were not known to the creditor to be such, was void as against the partnership and its creditors.—(*Central Law Journal.*)

A SCENE IN COURT.—During the Herne Bay Waterworks petition in the Court of Chancery, London, on Wednesday, a scene occurred between Vice-Chancellor Malins and Mr. Glasse, Q.C., the leading counsel of the court. The Vice-Chancellor having stated that the case had better stand over till the November sittings, Mr. Glasse remarked on the inadequacy of the court to deal with the business. The Vice-Chancellor: That is a very improper remark for you, as the leading counsel of the court, to make.—Mr. Glasse: The public will judge.—The Vice-Chancellor: Your remarks are of an infamous description. I wonder you have the audacity to make them.—Mr. Glasse (who spoke with suppressed excitement): I, standing here, will not condescend to tell your lordship what I think of you.

We suppose that Punch's epigram on "Heads in Chancery" is *apropos* of this:

Says Malins to Glasse,  
"I think you're an ass!"  
Says Glasse back to Malins,  
"I pity your failings!"

## FLOTSAM AND JETSAM.

**A SOMNAMBULIST CONVICT.**—According to the Scotch papers, a prisoner was recently convicted at Edinburgh of having, while in a state of somnambulism, murdered his child, and has since been set at liberty. Cases of this kind are very rare, but, assuming the somnambulism to be clearly proved, there can be little question of the correctness of the course adopted. Dornbluth, the German psychologist, tells of a young woman who, in consequence of a fright occasioned by an attack of robbers, was seized with epilepsy, and became subject to somnambulism. While in that condition she was in the habit of stealing articles, and was charged with theft, but on the advice of Dornbluth was released and eventually cured. Steltzer (cited in Wharton and Stillé) gives an account of a somnambulist who clambered out of a garret window, descended into the next house, and killed a young girl who was asleep there. And the same learned writers quote from Savarin an account of a somnambulist monk (related to Savarin by the prior of the convent where the incident happened): "The somnambulist entered the chamber of the prior, his eyes were open but fixed, the light of two lamps made no impression upon him, his features were contracted, and he carried in his hand a large knife. Going straight to the bed, he had first the appearance of examining if the prior was there. He then struck three blows, which pierced the coverings, and even a mat which served the purpose of a mattress. In returning, his countenance was unbent, and was marked by an air of satisfaction. The next day the prior asked the somnambulist what he had dreamed of the preceding night, and he answered that he had dreamed that his mother had been killed by the prior, and that her ghost had appeared to him demanding vengeance; that at this sight he was so transported by rage that he had immediately run to stab the assassin of his mother." Savarin adds that if the prior had been killed the monk could not possibly, under these circumstances, have been punished.—*Legal News*.

**TITLES.**—The English Court of Appeal, according to the *Solicitor's Journal*, appears to be somewhat of the opinion of Sir Thomas Smith, who saith: "As for gentlemen, they be made good cheap in this kingdom; for whosoever studieth the laws of this realm \* \* \* he shall be called master, and shall be taken for a gentleman." In the course of the hearing of a petition in lunacy for the appointment of new trustees on the 7th ult., one of the persons proposed as a new trustee was described as an "esquire," and one of the persons who made an affidavit of fitness was

described as a "gentleman." It was stated that the "esquire" was, in fact, a justice of the peace, and that the "gentleman" was a solicitor. Lord Justice Cotton said that though the legal description of a solicitor was "gentleman," that term was very indefinite, and ought not to be used. In such an affidavit a solicitor ought to be described as a "solicitor," in order that the court might know his real position in life. And the term "esquire" was even worse than that of "gentleman," for it conveyed no information whatever to the court. A man who was a justice of the peace should be described by that title.

**ACTIONS FOR BREACH OF PROMISE OF MARRIAGE.**—In charging the jury, in the breach of promise case of *Harwood v. Grace*, on the 15th inst., Dowse, B., said:—"The positions of a man and of a woman in relation to marriage were very different. As a poet and judge of human nature had said—

'Man's love is of man's life a thing apart,  
'This woman's whole existence.'

He had lately read in a leading literary journal an article in favour of a bill now before Parliament. The writer said that actions for breach of promise of marriage only forced men to marry women they did not wish to marry. They did nothing of the kind. Men were at perfect liberty not to marry if they liked, even where they had made a promise, but they must pay for the operation of breaking their promises. He hoped he would never see the time when these actions would be abolished. They were the only protection young women had against the wiles of a sex that often took advantage of their weakness."—*Irish Law Times*.

The legal profession in a County Town North of Toronto, should petition to have the advertiser below called to the Bar at once. He would be a fit companion for, and give some new ideas to, the advertising portion of our profession. He thus advertises his "lines":—

"A CARD.—I notice that outside of my own legitimate conveyancing practice, a great many persons go to Barry, or Toronto, to get certain lines of conveyancing done, such as letters of administration, guardianship, etc., done. This extra expense is entirely unnecessary. I am constantly employed in every branch that appertains to the conveyancing practice; and in any particular case that the neighbouring practitioner does not see his way clearly into, let the party come to me and I will guarantee satisfaction."

Advocate to witness: "Did you come on your subpoena?" "No; I walked."

## LAW SOCIETY, TRINITY TERM.

Method is essential, and enables a larger amount of work to be got through with satisfaction. "Method," said Cecil (afterwards Lord Burleigh), "is like packing things in a box; a good packer will get in half as much again as a bad one." Cecil's despatch of business was extraordinary, his maxim being, "The shortest way to do many things is to do only one thing at once."

The rights of women is a pet theory in the United States; it will be gratifying, perhaps, to those unhappy bachelors who dread being crowded out by the female sex, to know that there has recently been published in Philadelphia a work called, "*Husband's Law of Married Women*," unless, indeed, this is henpecked husband.

Henri de Tourville, the Englishman, who was convicted by an Austrian tribunal and sentenced to death for wife murder, and

whose sentence was afterwards commuted to one of twenty years' penal servitude, has been disbarred, and his name removed from the list of members of the Honourable Society of the Middle Temple.

The attorney for a cabman who had been knocked off his box and injured, said: "The particulars speak with mute eloquence; and I may say for my client, with Mark Antony, his scars shall plead his cause." Counsel: "After this Roman eloquence, I beg to object that the particulars are insufficient."

DRACONIAN (Scene—Police Court, North Highlands).—Accused—"Put, Pailie, it's na provit!" Bailie—"Hoots toots, Tonal, and hear me speak! Aw'll only fine ye ha'-a-croon the day, because et's no varra well provit. But if ever ye come before me again, ye'll no get aff under five shillin's whether et's provit or no!"—*Punch*.



## Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 42ND VICTORIA.

During this Term, the following gentlemen were called to the Bar; namely:—

HENRY PIGOTT SHEPPARD.  
ISAAC CAMPBELL.  
A. BRISTOL AYLSWORTH.  
RICHARD DULMAGE.  
HARRY RATCHER BECK.  
MATTHEW WILSON.  
WILLIAM HENRY FERGUSON.  
WILLIAM E. HIGGINS.  
JAMES CARRUTHERS HEGLER.  
FREDERICK WILLIAM PATTERSON.  
EUGENE LEWIS CHAMBERLAIN.  
MACFIELD SHEPPARD.  
NEIL A. RAY.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely:—

*Graduates.*

WILLIAM RIDDELL.  
DAVID PHILIP CLAPP.

ADAM JOHNSTON.  
GEORGE GORDON MILLS.  
GEORGE WILLIAM BEYNON.  
JOHN HENRY MAYNE CAMPBELL.  
CHARLES MILLAR.  
THOMAS ALFRED O'ROURKE.  
EDWARD ROBERT CHAMBERLAIN PROCTOR.  
CONRAD BITZER.  
JOHN RUSSELL.  
JOHN WILLIAM RUSSELL.

*Matriculants.*

W. J. TAYLOR.  
HARRY THORPE CANNIFF.  
THOMAS PARKER.  
A. DOUGLAS TONTON.  
ALBERT EDWARD DIXON.

And as an Articled Clerk—

EUDO SAUNDERS.

*Junior Class.*

J. L. MURPHY.  
A. G. CLARKE.  
W. B. DICKSON.  
W. G. WALLACE.  
T. K. PORTEOUS.  
O. H. TENNENT.  
M. S. MCCRANEY.  
J. TELFORD.  
C. H. CLEMENTI.  
W. HAWKE.  
J. B. PATTERSON.  
J. W. HANNA.  
C. H. CLINE.  
G. W. DANKS.  
C. A. HESSIN.  
R. E. HARDING.  
C. HENDERSON.  
J. CAMPBELL.  
J. G. CHEYNE.  
F. E. BERTRAND.  
T. MOFFAT.  
S. O. RICHARDS.

*Articled Clerks.*

A. F. GODFREY and  
HUGH McMILLAN, as of Easter Term.

## LAW SOCIETY, TRINITY TERM.

PRIMARY EXAMINATIONS FOR  
STUDENTS-AT-LAW AND ARTICLED  
CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

## CLASSICS.

Xenophon, *Anabasis*, B. I.; Homer, *Iliad*, B. I.; Cicero, for the *Manilian Law*; Ovid, *Fasti*, B. I., vv. 1-300; Virgil, *Æneid*, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

## ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. Musæus, *Stumme Liebe*. Schiller, *Iied von der Glocke*.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-

at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or,

Virgil, *Æneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography — North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

After Hilary Term, 1879, the Matriculation Examination will be as follows:—

## SUBJECTS OF EXAMINATION.

*Junior Matriculation.*

## CLASSICS.

- |      |  |
|------|--|
| 1879 | { Xenophon, <i>Anabasis</i> , B. II.<br>Homer, <i>Iliad</i> , B. VI.   |
| 1879 | { Cæsar, <i>Bellum Britannicum</i> .<br>Cicero, <i>Pro Archia</i> .<br>Virgil, <i>Eclog.</i> I., IV., VI., VII., IX.<br>Ovid, <i>Fasti</i> , B. I., vv. 1-300. |
| 1880 | { Xenophon, <i>Anabasis</i> , B. II.<br>Homer, <i>Iliad</i> , B. IV.   |
| 1880 | { Cicero, in <i>Catilinam</i> , II., III., and IV.<br>Virgil, <i>Eclog.</i> I., IV., VI., VII., IX.<br>Ovid, <i>Fasti</i> , B. I., vv. 1-300.                  |
| 1881 | { Xenophon, <i>Anabasis</i> , B. V.<br>Homer, <i>Iliad</i> , B. IV.  |
| 1881 | { Cicero, in <i>Catilinam</i> , II., III., and IV.<br>Cicero, <i>Fasti</i> , B. I., vv. 1-300.<br>Virgil, <i>Æneid</i> , B. I., vv. 1-304.                     |

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

## LAW SOCIETY, TRINITY TERM.

## ENGLISH.

A paper on English Grammar.  
Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and  
The Traveller.

1881.—Lady of the Lake, with special refer-  
ence to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History from William III. to George  
III., inclusive. Roman History, from the com-  
mencement of the Second Punic War to the death  
of Augustus. Greek History, from the Persian  
to the Peloponnesian Wars, both inclusive.  
Ancient Geography : Greece, Italy, and Asia  
Minor. Modern Geography : North America  
and Europe.

*Optional Subjects.*

## FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 }  
and } Souvestre, Un philosophe sous les toits.  
1880 }

1879 }  
and } Emile de Bonnechose, Lazare Hoche.  
1881 }

## GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 }  
and } Schiller, Die Bürgschaft, der Taucher.  
1880 }

1879 }  
and } Schiller { Der Gang nach dem Eisen-  
1881 } hammer.  
Die Kraniche des Ibycus.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Inter-  
mediate Examination shall be :—Real Property,  
Williams ; Equity, Smith's Manual ; Common  
Law, Smith's Manual ; Act respecting the Court  
of Chancery (C. S. U. C. c. 12), C. S. U. C. caps.  
42 and 44, and Amending Acts.

The Subjects and Books for the Second Inter-  
mediate Examination shall be as follows :—Real  
Property, Leith's Blackstone, Greenwood on the  
Practice of Conveyancing (chapters on Agree-  
ments, Sales, Purchases, Leases, Mortgages, and  
Wills) ; Equity, Snell's Treatise ; Common Law,  
Broom's Common Law, C. S. U. C. c. 88, and

Ontario Act 38 Vic. c. 16, Statutes of Canada,  
29 Vic. c. 28, Administration of Justice Acts  
1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduc-  
tion and the Rights of Persons, Smith on Con-  
tracts, Walkem on Wills, Taylor's Equity Juris-  
prudence, Stephen on Pleading, Lewis's Equity  
Pleading, Dart on Vendors and Purchasers,  
Best on Evidence, Byles on Bills, the Statute  
Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the  
preceding :—Russell on Crimes, Broom's Legal  
Maxims, Lindley on Partnership, Fisher on Mort-  
gages, Benjamin on Sales, Hawkins on Wills,  
Von Savigny's Private International Law (Guth-  
rie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's  
Mercantile Law, Taylor's Equity Jurisprudence,  
Smith on Contracts, the Statute Law, the Plead-  
ings and Practice of the Courts.

Candidates for the Final Examinations are  
subject to re-examination on the subjects of the  
Intermediate Examinations. All other requisites  
for obtaining Certificates of Fitness and for Call  
are continued.

## SCHOLARSHIPS.

*1st Year.* — Stephen's Blackstone, Vol. I.,  
Stephen on Pleading, Williams on Persons,  
Property, Hayne's Outline of Equity, C. S. U. C.  
c. 12, C. S. U. C. c. 42, and Amending Acts.

*2nd Year.* — Williams on Real Property, Best  
on Evidence, Smith on Contracts, Snell's Treatise  
on Equity, the Registry Acts.

*3rd Year.* — Real Property Statutes relating to  
Ontario, Stephen's Blackstone, Book V., Byles  
on Bills, Broom's Legal Maxims, Taylor's Equity  
Jurisprudence, Fisher on Mortgages, Vol. I. and  
chaps. 10, 11, and 12 of Vol. II.

*4th Year.* — Smith's Real and Personal Property,  
Harris's Criminal Law, Common Law Pleading  
and Practice, Benjamin on Sales, Dart on Ven-  
dors and Purchasers, Lewis's Equity Pleading,  
Equity Pleading and Practice in this Province.

## DIARY—CONTENTS—EDITORIAL NOTES.

## DIARY FOR NOVEMBER.

1. Fri...Hon. R. A. Harrison, Chief Justice of Ontario, died, 1878.
3. Sun...Hon. W. H. Draper, Chief Justice of the Court of Appeal for Ontario, died, 1877.
5. Tues...Primary examinations—written.
6. Wed...Primary examinations—oral.
9. Sat....Prince of Wales born, 1841.
11. Mon...Battle of Cryslar's farm, 1818.
12. Tues...Intermediate examinations.
13. Wed...Battle of Windmill Point, 1838. Intermediate examinations.
14. Thurs...Examinations for certificates of fitness.
15. Fri...Examinations for call.
16. Sat....Wilson, J., sworn in as Judge of Q. B., 1868.  
Gwynne, J., sworn in as Judge of C. P., 1868. Examinations for call with honors.
18. Mon...Michaelmas Term begins. Law Society Convocation meets.
19. Tues...Law Society Convocation meets.
23. Sat....Law Society Convocation meets.
27. Wed...Frontenac died at Quebec, 1698.
30. Sat...St. Andrew's Day.

## CONTENTS.

EDITORIALS:	PAGE
Death of Chief Justice Harrison.....	281
Prisoners testifying on their own behalf.....	281
New Digest—Part XIV.....	282
Baron Alderson and the Trumpeters.....	282
Recent Municipal Cases.....	282
Cause of Action.....	283
Garnishing Surplus Moneys.....	283
When an Appeal will lie for Costs.....	283
The Charitable Spirit of the Law.....	285
Lord Chelmsford.....	286
The Maritime Court of Ontario.....	287
Law Society, Trinity Term, Resumé.....	291
<b>SELECTIONS:</b>	
Mr. Justice Keogh.....	292
The Promotion of Lord Cairns.....	294
Has the 29th of February a Legal Existence....	296
<b>NOTES OF CASES:</b>	
Chancery.....	297
<b>CANADA REPORTS;</b>	
QUEBEC—	
In re Montreal Centre Election.....	298
Election—Count—Ballots opened by Returning Officer.	
<b>ENGLISH REPORTS:</b>	
Digest of the English Law Reports for May, June and July, 1878.....	298
<b>LAW STUDENTS' DEPARTMENT;</b>	
Examination Questions.....	303
<b>CORRESPONDENCE.....</b>	<b>306</b>
<b>FLOTSAM AND JETSAM.....</b>	<b>306</b>
<b>LAW SOCIETY OF UPPER CANADA.....</b>	<b>306</b>

## Canada Law Journal.

Toronto, November, 1878.

## DEATH OF CHIEF JUSTICE HARRISON.

As we go to press, the melancholy news reaches us that the Hon. Robert Alexander Harrison, Chief Justice of Ontario, breathed his last this morning (1st November), at his residence in Toronto, at the early age of 45 years. The event will cause profound sorrow in the profession, who will mourn him as a brother. As for the public, they know well that they have lost one who was an able and fearless advocate, a learned, upright Judge, a faithful servant of the Crown, and an honest warm-hearted citizen. The writer and those who were for so many years intimately associated with him in the editorial management of this Journal, more especially grieve for the loss of one, who, in days gone by, was for many years its chief and most efficient Editor, and whose kindly advice and encouragement has ever since been at the service of his successors, and always gratefully received. We shall hereafter speak more fully of one, whose name is now enrolled with those of other eminent men who have so faithfully fulfilled the high office entrusted to them in this Ontario of ours.

The question as to whether it is advisable to allow prisoners to testify on their own behalf was before the Social Science Congress last year, and questions were addressed to the Chief Justices and Attorney-General in each of the States in the United States of America. The answers were, it is said, in favour of ?

## EDITORIAL ITEMS—GARNISHING SURPLUS MONIES, &amp;c.

change in that direction. There are weighty arguments against the change, but there is undoubtedly a growing feeling that criminals should not be debarred from making explanations under oath of facts which, very generally, are known only to themselves.

Part XIV of "Robinson and Joseph's Digest" brings the cases down to "Roads and Road Companies." This number includes the important titles of Principal and Agent, Principal and Surety, Public Schools, Railway Companies, Registry Laws, Replevin, &c. We need only add that it continues to show great lucidity of arrangement and careful scrutiny on the part of the compilers. The plan has been adopted of inserting all the recent cases in their proper places in each of the headings up to the time of publication. Any confusion which might result from this will be set right by an appendix at the conclusion of the work.

A story somewhat similar to that related of Mr. Justice Hawkins in our last number, respecting the official costume of the Sheriff of Derby, is told of the late Baron Alderson. The sheriff in one of the university towns, for the sake of economy, did not provide trumpeters to attend the judges as had been the custom. The Judge, on asking the sheriff where the trumpeters were, was told by the sheriff that he considered these officials so very useless that he determined to discontinue them. "Mr. Sheriff," said the Judge very angrily, "fifty years ago I was a student of this university; when I heard the trumpeters usher the judges into this town, their notes sounded so sweetly in my ears that I determined I would one day be a judge. I have respected trumpeters ever since, and I determined *not* to discontinue them. If

two of them are not here to-morrow morning I shall fine you £100."

The *Albany Law Journal* notes some cases of interest to our readers in country places, and to municipal corporations. The most recent is that of a man driving on a public highway, who was thrown out of his waggon and injured in consequence of his horses taking fright at some machinery which had been left on the road by the defendant, who was hauling it for the use of the city water-works. The Supreme Court of Rhode Island held that while defendant had the right to transport the articles mentioned along the public highway, even though they might be such as to frighten horses, he must exercise such right in such a way as not to endanger the lives and property of others who had equal rights on the highway. In this case it was shown that while some horses passed the load without trouble, other horses had been badly frightened, and the court said that one leaving such an object as this in the highway could not be said to be using the care demanded by the law of him.

Town corporations have been held liable for damages similarly caused by other obstructions on highways—obstructions in this sense meaning any object liable to cause fright—e.g. burning hay, piles of lumber, &c.: *Morse v. Richmond*, 41 Vt. 435; *Winship v. Enfield*, 42 N. H. 199; *Chamberlin v. Enfield*, 43 id. 358; *Littleton v. Richardson*, 32 id. 59. In *Bartlett v. Hooksett*, 48 N. H. 18, the town was held to be liable in the case of a pig sty which projected into the highway, horses being frightened by the noise of the pigs therein. See, to the same effect, *Foshay v. Glen Haven*, 25 Wis. 288; *Stone v. Hubbardston*, 100 Mass. 49; also, *Conkton v. Thompson*, 29 Barb. 218;

## GARNISHING SURPLUS MONEYS—WHEN AN APPEAL WILL LIE FOR COSTS.

The words "Cause of Action," which have been the text of so much discussion both here and in England, have again been a bone of contention in our Court of Queen's Bench in the case of *O'Donohoe v. Wiley*, 43 U. C. R. 350. Harrison, C. J., in delivering the judgment of the Court after giving a short but interesting review of the course the decisions have taken on this subject, stated that the case of *Jackson v. Spittal*, L. R. 5 C. P. 542, which was agreed to by the judges in England, after a conference, in *Vaughan v. Weldon*, L. R. 10 C. P. 47, would be followed. It will be remembered that these cases decided that the words do not mean the *whole cause of action* but the breach alone. The same words, though in a different connection, are used in our Division Courts Act, but under that Act, for the reasons given in *Noxon et al. v. Holmes et al.*, 5 C. P. 541, the words are still held to mean, in accordance with the previous decisions in our own Courts, the whole cause of action, i. e. the contract and the breach.

We notice some typographical and clerical errors in the report of *O'Donohoe v. Wiley*. In the head note the case of *Jackson v. Spittal* is cited as *Spittal v. Jackson*; Rev. Stat. O. ch. 50 is referred to as ch. 20; at page 356, *Noxon et al. v. Holmes et al.* is spoken of as "*Noxen v. Holmes et al.*"; and at page 364, *McGivern v. James et al.* is cited as *McGiverin v. Smith et al.* A good proof reader is a *rara avis*.

## GARNISHING SURPLUS MONEYS.

In *Nicol v. Ewin* (ante, p. 171), Mr. Dalton upon a special case submitted to him for judicial opinion, came to a conclusion somewhat at variance with a decision of Draper, C. J., in *McKay v. Mitchell*, 6 U. C. L. J. 61. The question be-

fore the Chief Justice was as to the rights of a creditor who had obtained a garnishing order for the payment of the surplus proceeds of a sale of land in the hands of the mortgagee who had exercised his power of sale. It appeared that there were other judgments which formed liens on the land prior to the plaintiff's judgment. But it was held that the proceeds of the sale were not affected by these prior judgments and the money was ordered to be paid to the attaching creditor. Mr. Dalton, admitting that this case might represent the position at law of the rival claimants, thought that it was not so in equity, and, as he had to decide finally upon the rights of the parties, legal and equitable, he held, under similar circumstances, that the creditors who had liens in the land retained such liens by way of priority against the proceeds when the land was sold under a power of sale paramount. It became necessary to consider this question lately in England in the case of *Backhouse v. Liddle*, 38 L. T. N. S. 487, and an opinion was expressed by Lord Coleridge, substantially in conformity with Mr. Dalton's views. It was a case of garnishment for the surplus money of a mortgaged property which had been sold, and it was thought that had the judgment been a lien on the land it would have retained its charging efficacy against the land when converted; but, as no steps had been taken under 27-28 Vict. c. 112 s. 1, to "levy on" an execution upon the judgment, it was held that the land was not affected by a registered judgment executed in part by a writ of *fi. fa.* unless it had been actually delivered in execution.

## WHEN AN APPEAL WILL LIE FOR COSTS.

It is a general rule observed by all the Courts on the question of costs that the



## WHEN AN APPEAL WILL LIE FOR COSTS.

Court will not entertain a case, where the subject-matter of the suit or action has been in fact settled before litigation, for the mere purpose of determining who is entitled to costs: *Griffin v. Brady*, 39 L. J. Ch. 136; *Re Holden*, 39 U. C. R. 88; *Samson v. Haggart*, 25 Gr. 543. The same principle underlies the uniform practice observed in the Courts of refusing to entertain an appeal on the question of costs alone, save in certain special and exceptional cases. In what may be called the leading case on this subject (*Owen v. Griffith*, 1 Ves. Sr. 249), Lord Hardwicke said that the foundation of the rule was to prevent vexation and trouble; for, as cases in equity often depend on abundance of circumstances, about which as the reason of mankind might differ, it would create perpetual appeals. However, in that case an appeal for costs was entertained on behalf of an incumbrancer who had been deprived of costs and ordered to pay the plaintiffs costs. It was said that being an incumbrancer for a just debt, he had a lien on the estate for costs, as well as for his demand, and the deprivation of costs, therefore, affected the merits of the case. This case indicates the first and chief exception, and may be formulated thus: Where the party has a right to costs and is deprived of them, he can appeal. Such a case arose in *Cotterell v. Stratton*, L. R. 8 Ch. 295, where a mortgagee, not guilty of vexatious or oppressive conduct, was refused his costs of suit in a suit to redeem. Lord Selborne said that the right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he had forfeited them by some improper defence or other misconduct, was well established, and did not rest upon any exercise of that discretion of the Court which in litigious causes was generally not subject to review. The Lord Chancellor then referred

to another of such cases, namely that of a trustee, in the following language:—The contract between the author of a trust and his trustees entitled them to all their proper costs incident to the execution of the trust, by way of indemnity, out of the trust estate, as between themselves and the *cestuis que trust*. These rights resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of the mortgagee or trustee as might amount to a violation or culpable neglect of his duty under the contract.

The effect of Lord Selborne's language as to a trustee is, however, considerably modified by the subsequent decision in *Re Hoskins' Trusts*, L. R. 6 Ch. D. 281, where Lord Justice James held that where a trustee has been deprived of costs on account of impropriety of conduct, an appeal on that ground for costs alone will not lie; and, speaking generally, he said, the costs of a trustee are subject to the discretion of the Court. See also *Taylor v. Dowlen*, L. R. 4 Ch. 697.

The position of trustees was again brought before the Court of Appeal in *Re Chennell*, 26 W. R. 595. An order was made directing the payment of a trustee's "costs, charges and expenses," and the Court held that was appealable. The Master of the Rolls pointed out that a great deal more than costs was included in the allowance of charges and expenses. In one sense these were in the discretion of the Court, but not in the ordinary sense. The Court had a discretion for gross misconduct to deprive a trustee of them, and, therefore, he said it is a very substantial matter, when you have a case of gross misconduct charged against a trustee, that you should deprive him of his charges and expenses out of the fund. This decision may, perhaps, afford a clue to the reconciliation of the

## THE CHARITABLE SPIRIT OF THE LAW.

views of Lord Selborne and Lord Justice James above given.

Again, when persons are made parties in a representative character, and have done no wrong, they are entitled to costs, and if costs are withheld, an appeal for that alone will be sustained : *Etherington v. Wilson*, L. R. 1 Ch. D. 160.

In *Re Chennell*, it was laid down by two of the judges that an order directing the payment of costs was not appealable merely because it specified a particular person or a particular fund, by whom or out of which they are to be paid. This is opposed to earlier cases, and is the result of a construction placed upon one of the rules framed under the English Judicature Act.

When the Judge of the Court below placed on record on the face of the decree the reason why he ordered the plaintiff to pay the costs, and this was founded on the determination of a question of law, the Court of Appeal allowed the question of law to be argued, that it might determine whether the reason embodied in the decree was well founded : *Walker v. French*, 21 W. R. 493. Similar to this is the case where the judge below came to the conclusion that there had been a breach of an injunction, and on that ground ordered the defendant to pay costs. The Court of Appeal held that the defendant was not without a right of appeal, because these costs were not in the discretion of the Court : *Will v. Corcoran*, L. R. 2 Ch. D. 69.

—  
THE CHARITABLE SPIRIT OF  
THE LAW.  
—

[Communicated.]

—  
The charitable spirit of the law appears not only in the special favour shown

by the Law to Charities, but also in many of the rules which form the Law of Evidence ; many of which might seem to be mere deductions from the apostolic dictum, "Charity thinketh no evil."

One most striking instance of this spirit appears in the strong presumption of the law against crime and illegality—that presumption which gives the benefit of the doubt to the accused. The rule with regard to this in criminal cases is emphatically stated by Baron Martin in *Reg. v. White*, 4 Fost. & Finl. 383 (1865). The indictment was for scuttling a ship with intent to defraud. Baron Martin told the jury that in order to enable them to return a verdict against the prisoner, they must be satisfied beyond any reasonable doubt of his guilt ; and this as a conviction created in their minds, not merely as a matter of probability. In a note annexed to the report of this case, the reporters point out that, although this is the real rule of law as to the sufficiency of proof in criminal cases, yet of late (as in the case of *R. v. Muller*, C. C. C. 1865) there had been observed a disposition to contract its application, and even to substitute for it a much looser rule. The reporters then quote the words of Gurney, B., to the jury in *Belamy's case*, C. C. C. 1844 : "If you think the case has left you in doubt so that you cannot safely convict, you will remember that it is better that many guilty men should escape than that one innocent man should perish : " and they maintain that this is the rule laid down by every judge from Hale to Gurney.

Such, then, is the presumption of innocence in the criminal courts. Some authorities would lead us to suppose that this so strong presumption on the subject is confined to those courts. Thus in *Magee v. Mark*, 11 Ir. O. L. 453 (1861),—an action for penalties under the Cor-

## LORD CHELMSFORD.

rupt Practices Prevention Act—although the evidence for the plaintiff rested solely upon the evidence of accomplices, it was held that the jury were rightly directed that they might find for the plaintiff upon such evidence though uncorroborated. Pigot, C.B., in his judgment in this case, observed: "To lay down, as a general proposition, that the presumption of innocence in a civil case cannot be rebutted while a doubt remains, would be, I believe, to affirm a doctrine perfectly new, and calculated to create the greatest embarrassment in trial by jury." In support of this the Chief Baron cites *Best on Evidence*, p. 120, 3rd ed., and *Cooper v. Slade*, 6 H. L. C. 772, per Willes, J. Mr. Taylor, in his work on *Evidence*, does indeed cite *Cooper v. Slade* in support of the statement that in mere civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict. But he goes on to assert (p. 127, 7th ed.) that the rule, that all imputations of crime must be strictly proved, is recognised alike by all tribunals, whether civil or criminal, and is equally effective in all proceedings, whether the question of guilt be directly or indirectly raised. And certainly the cases appear to support this language. Thus, where a fire insurance company pleaded that the plaintiff wilfully burnt down the premises, it was held that the jury, before they found a verdict against the plaintiff, must be satisfied that the crime imputed to him was proved by as clear evidence as would justify a conviction for arson: *Thurtell v. Beaumont*, 1 Bing. 389 (1823).

So again, where there was a plea of justification in an action of libel, stating that the plaintiff had committed the for-

gery which the libel accused him of, to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff if he was on trial for those offences: *Chalmers v. Shackell*, 6 C. & P. 475 (1834). So with bigamy in a similar case: *Wilmet v. Harmer*, 8 C. & P. (1839). And the application of the presumption against crime to civil as well as criminal cases—or, which is much the same thing, whether the question arise directly or indirectly—seems strikingly illustrated by comparing *Brady's case*, 1 L. C. C. 329 (1784), with *McGregor v. Topham*, 3 H. L. C. 147 (1850). In the former case the charge was for taking a false oath, and the Court held that it was incumbent on the prosecutor to fit the evidence to the particular fact, and to prove every circumstance which was necessary to bring it within the range of the Law, not only by clear, precise, and exact evidence, but by the best evidence that is possible to be produced. And the necessity for the best evidence is also shown by *Williams v. E. India Co.*, 3 East 192 (1802).

In *McGregor v. Topham*, 3 H. L. C. 147, the question of forgery and perjury arose indirectly in connection with the trial of an issue *devisavit vel non*, and Lord Brougham said: "All Judges in the exercise of their high offices, and indeed not only Judges, but all Christian men, ought, in common charity due from one fellow creature to another, to take that course, if it can correctly and justly be taken, which shall avoid imputing the guilt of that most horrid crime of perjury to any of the parties whose conduct comes in question."

(To be continued.)

## LORD CHELMSFORD.

Frederick Thesiger, Lord Chelmsford, died last month, as we have already

## THE MARITIME COURT OF ONTARIO.

stated. He has left a record as honourable to himself as it is worthy of the profession of which he was such a distinguished member. The *Law Journal* thus alludes to him :—

“The deceased nobleman was born on July 15, 1794, and was a son of Mr. Charles Theisger, Collector of Customs at St Vincent. At an early age Mr. Frederick Theisger entered the Royal Navy, and in the year 1807 was engaged in warlike operations before Copenhagen. After a short service at sea he turned his attentions to pursuits of a more peaceful character, and became a student at Gray's Inn; was called to the bar in 1818, and chose the Home Circuit. In 1834 he became King's Counsel; in 1840 he was elected member for Woodstock; in 1844 he was made Solicitor-General, and in 1845 Attorney-General; and in 1858 he was appointed Lord Chancellor. He also held the Great Seal a second time, in 1866, under Lord Derby; but on Mr. Disraeli becoming Prime Minister, the Great Seal passed into the hands of Lord Cairns.

“At the bar Mr. Theisger—or, perhaps we ought to say, Sir Frederick Theisger—achieved a success almost without parallel. He was not quite so persuasive as Scarlett, but far more eloquent, and certainly more admired and respected. His fine presence, equal temper, pleasant manner, and excellent voice, attracted attorneys, suitors and jurymen, while his high sense of honour, courteous bearing, and real kindness of heart won the affections and esteem of the bar. Undoubtedly, he was the most popular barrister of his day, and was especially the favourite of the attorneys and solicitors of his time. In society he shone with equal brightness; and even in his old age his jokes, sallies of humour, and anecdotes, lost nothing of their fun and point. It was the fashion to decry his ‘law,’ on the general principle, or rather on the common fallacy, that an eloquent man is never a profound lawyer. But a fair and unprejudiced study of his judgments in the House of Lords would lead an inquirer to form a different and more correct estimate of his powers. In

truth, Nature had been liberal to him; for she had bestowed on him bodily and mental gifts of a high order, and given him those qualities, both outwardly and inwardly, which go to make up a successful barrister and able judge.

“It must of necessity be a matter of regret to see a man of this type fall from the ranks; but when eighty-four years of life have been completed, when every honour has been won, when the love and regard of fellow-men have been secured, when sons have risen to high places in public service, the debt of nature may be paid without a pang to the man, and without sorrow to the survivors. A life of solid happiness was the lot of Lord Chelmsford. Fortunate in public and private life, with hundreds of friends and without a foe, he might look back and acknowledge, as did the great Lord Hardwicke, that he had been singularly blessed in life. In peace and honour he has passed away, but his name will live among us for years to come.”

## THE MARITIME COURT OF ONTARIO.

The formation of the Maritime Court was completed by Proclamation on the 15th of February last.

The first sitting of the Court was held on the first day of last month, by Kenneth McKenzie, Esq., the Judge of the Court. Two assessors were associated with him. His Honour alluded at some length to the circumstances attending its establishment, the object of its institution, its powers and jurisdiction, speaking as follows:

“A Court of Maritime Jurisdiction for the administration of admiralty or maritime laws upon the great lakes and other inland waters of Ontario is a new institution called into existence by the Parliament and Government of Canada, invested with special jurisdiction in connection with the navigation and trade of these inland waters.

“Great Britain, the first maritime nation in the world, has had for ages officers and tribunals to afford redress for wrongs committed on the high or open seas in connection with maritime

## THE MARITIME COURT OF ONTARIO.

commerce, trade, and navigation. Maritime or Admiralty Courts are those which have jurisdiction in this respect, and are governed by a system of laws peculiarly qualified to afford redress in cases of that class with which their practice is conversant, and in which the ordinary process of the Common Law would be ineffectual and inapplicable.

"Our laws and public institutions are framed and fashioned as near as can be after those of the Mother Country, and justly so. The Maritime Courts of England at the present day are the High Court of Admiralty and its Courts of Appeal, with the Admiralty jurisdiction recently extended to certain County Courts. There are also Vice-Admiralty Courts in several British Colonies and Provinces of the Empire, deriving authority from the Crown, from which appeals lie to the Privy Council.

"The Court of Admiralty for Scotland was abolished some time ago, and maritime causes are now presented in the Court of Sessions or the Sheriff's Court.

"The Maritime Courts of Ireland are the High Court of Admiralty of Ireland, and its Courts of Appeal, and jurisdiction given to local courts in regard to maritime affairs.

"Formerly the High Court of Admiralty in England was a two-fold tribunal, the one the Instance Court of Admiralty, in which controversies were decided relating to maritime contracts and wrongs committed on the high seas; the other the Prize Courts, in which the right to captures and seizures made in war was determined."

The Judge then gave a short sketch of the origin and of the jurisdiction of the High Court of Admiralty in England. He then continued:

"The jurisdiction of the English Admiralty, as actually exercised in its earliest days and for centuries afterwards, was most extended, various and ample, embracing all maritime causes of action, civil and criminal, of contract and tort, arising on the sea.

"The Commission of the Lord High Admiral of England conferred 'a most ample jurisdiction to take cognisance of and proceed in all matters maritime, and also of any cause, business, or injury had or done, in or upon or through the seas or public rivers, streams, havens and places subject to overflowing and ebbing of the sea, upon the shores or banks adjoining them from the first bridges towards the sea throughout England, Ireland, and the Dominion of the Crown elsewhere beyond the seas.

"In several of the British Colonies there are Courts of Vice-Admiralty. The jurisdiction of the Courts of Vice-Admiralty is derived from the

Crown, and depends upon the various patents. Neither the Governor of British Colony or Dominion, the Vice-Admiral of a station, nor the Lords Commissioners of the Admiralty, have of themselves any authority to establish a Vice-Admiralty Court in any Colony or Dominion of the Crown. The Imperial Act, 26 Vic., cap. 24 (1863), was passed to facilitate the appointment of Vice-Admirals, Judges, and other officers in Vice-Admiralty Courts abroad, and to extend the jurisdiction and amend the practice of those Courts. I will refer to the matters in respect of which the Vice-Admiralty Courts have jurisdiction. The Vice-Admiralty Courts of some of the Provinces of the Dominion interest us more particularly than those existing elsewhere. The Provinces of Quebec, New Brunswick and Nova Scotia, have each a Court of Vice-Admiralty for the administration of maritime law. The Governor-General is the Vice-Admiral of the whole Dominion.

"Shortly after the Treaty of Paris, on the 10th of February, 1763, 'by which Canada was ceded by the Crown of France to that of Great Britain his Majesty King George the Third issued a Commission under the Great Seal of the High Court of Admiralty of England, establishing a Court of Vice-Admiralty for the Province of Quebec, to have jurisdiction therein according to the civil and maritime laws, and ancient customs of His Majesty's High Court of Admiralty of England, and this Court has been continued by repeated Commissions down to the present time, so far as Lower Canada or the Province of Quebec is concerned.' The above extract is taken from the preface to the volumes of Stuart's reports of cases decided in the Vice-Admiralty Court of Lower Canada, a copy of which every proctor of our Maritime Court should possess, if possible.

"On the 19th March, 1764, a Commission constituting the Governor-in-Chief of the Province of Quebec (Governor Murray), Vice-Admiral of the same, conferring on him great powers in Admiralty matters, civil and criminal, issued. This Commission is tested at London, 'in the High Court of Admiralty of England, under the Great Seal thereof.' The jurisdiction conferred on the Vice-Admiral was restricted to 'matters occurring on the sea and shores, creeks, or coasts of the sea or maritime, as in, upon, or by all fresh waters, ports, public streams, or places overflowed whatsoever, within the ebbing and flowing of the sea and high water.'

"On the 27th October, 1838, a Commission under the [Great Seal of the High Court of Admiralty of England issued, appointing the Hon. Henry Black, Judge of the Vice-Admiralty Court of Lower Canada. The jurisdiction of the Court was restricted by this Commission, as in

## THE MARITIME COURT OF ONTARIO.

the Commission to the Governor, to the sea, public streams, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea or high water mark. It thus appears that the Vice-Admiralty jurisdiction has been regulated by the ebbing and flowing of the sea. I believe it has always been so in England. In England, between high and low water was, on all hands, held to be the sea when the tide was in. But in places where there was no flowing or ebbing of the sea or tide, the Admiralty Court, as a general thing, had no jurisdiction. The Vice-Admiralty Court of Quebec, or Lower Canada, in such jurisdiction, was regulated by the flux or reflux of the tide, and not beyond. As the tide of the sea never extended to the great lakes and inland seas and rivers of Ontario, the maritime commerce on the Lakes Ontario, Erie, Huron, Superior, and the portions of the Rivers St. Lawrence, Ottawa, and others belonging to Canada, was left without maritime or Admiralty laws, which existed with great advantages elsewhere. The maritime commerce of the inland seas of Ontario, Erie, Huron and Superior, and the great rivers of St. Lawrence and Ottawa and in the Welland and other Ontario canals, have so immensely increased that a delay of a tribunal to enforce the rights and duties in connection with matters arising out of the shipping and navigation, trade and commerce, in the rivers, lakes, canals, and inland waters of Ontario would operate unjustly to a large and meritorious class of men, seafaring men, and to maritime commerce, &c.

"Many well informed people have not realized the extent and magnitude of the maritime commerce of Ontario. While the Bill for the establishment of a Maritime Court of Ontario was in progress, I looked into the matter with some care, and I was astonished at the result myself. Looking at the tables annexed to the report of the Minister of Customs for 1875, it will appear that the number of vessels which entered the several ports of the Provinces of Quebec, New Brunswick, Nova Scotia, and Prince Edward Island during the fiscal year ending 30th June, 1875, was 7,881, that is to say:—From Great Britain, 1,522; from British Colonies, 1,226; from the United States, 4,238; from other countries, 895. The number of vessels that cleared out of these ports during said fiscal year was 7,724. Looking at the same tables, so far as they regard Ontario, it will be seen that during the same fiscal year ending on the 30th June, 1875, that 11,812 vessels entered the ports of Ontario, 3,931 vessels more than entered all the ports of the three Eastern Provinces of the Confederation. Canadian steam vessels then entering Canadian ports 2,896; Canadian sail vessels, 4,058; United States steam vessels, 2,227; United

States sail vessels, 2,581; make a total number of 11,812. On examining the report of the Minister of Inland Revenue for 1875, it will appear that 11,496 vessels passed through the St. Lawrence Canal during the season of navigation ending 31st December, 1874, I think it may be reasonably inferred that about the half of these vessels would go to the Province of Quebec, and the other half come into the Province of Ontario. Then giving half this number to Quebec and the other Eastern Provinces, about 16,290 vessels passed through the canals within Ontario. The Province of Quebec would, for the year 1874, nearly stand thus—5,748, being about half the number of vessels passing through the St. Lawrence Canal, 5,410 passed through the Ottawa Canal, and 3,285 through the Chambly Canal, in all, 14,433 vessels.

"Looking at these figures, which I think are substantially correct, and at this Province as the largest and richest of the Dominion, with great lakes, rivers, and canals, and with a water coast from Lake St. Francis to Thunder Bay, every reasonable mind must see that the rules and laws which protect and regulate the maritime commerce and trade in other Provinces and countries should be applicable to Ontario, and that the general rules and laws of the sea should be enforced on the great inland seas and rivers by a Court with a jurisdiction *in rem* on these inland waters so far as practicable. The propriety of establishing a Court with such jurisdiction has been discussed for several years, and urged on Government for a long time, and a respected citizen of Toronto, who is here present to-day, as one of the first assessors of the new Maritime Court of Ontario (I mean Captain Taylor), was among the first who saw the necessity of introducing the general rules and laws of the sea into this Province, and advocated the establishment of a Court among us with maritime jurisdiction, to protect the just rights of seafaring men and maritime commerce.

"The Imperial authorities could not see their way clear how to deal with this matter in the outset, but in 1876 the late Minister of Justice, Mr. Blake, visited England on behalf of the Dominion Government, to confer with her Majesty's Government regarding, among other things, the question of Maritime Jurisdiction upon the inland waters of this Province. He addressed the Secretary of State for the Colonies, the Earl of Carnarvon, reminding him that the Canadian Government had come to the conclusion that the proper course was to establish Courts of Maritime Jurisdiction on the great lakes and other inland waters of Canada by local legislation. After a conference with the Registrar of the High Court of Admiralty, and further correspondence with the Colonial Department, the Imperial

## THE MARITIME COURT OF ONTARIO.

authorities conceded the right claimed in this respect by the Canadian Government to establish a Maritime Court here by Canadian legislation. After his return to this country, the Minister of Justice introduced a Bill into the House of Commons at Ottawa to establish such a Court. It passed both Houses of Parliament, and received the Royal assent on 28th April, 1877, and became law as "The Maritime Jurisdiction Act, 1877," 40 Vic., cap. 21.

"The first and second sections of the Act point out the maritime rights and remedies and the jurisdiction of the Maritime Court to enforce them. The rest of the Act respects the appointment of officers, judge, surrogate judges, registrar, marshal, assessors, and the providing of the proper machinery for the working of the Court for the benefit of the public according to law.

"The right to constitute what is called a suit or proceeding *in rem* in a Maritime Court is peculiar to Admiralty and Maritime Courts. The above Act confers on this Court, in the most ample manner, jurisdiction to entertain suits and proceedings *in rem*. Proceedings *in rem* are against the ship, cargo, freight, or the thing itself, and do not extend to the person unless some person intervenes and assumes the responsibilities of the controversy. But so far as the ship or thing itself is concerned, all the world are bound by the decree of the Court. By the regular process of the Court, all parties who have an interest in the thing are warned to come in and defend it, and therefore it is said that the whole world are parties to an Admiralty cause, and bound by its decision. The right to proceed *in rem*, to enforce what is termed, in maritime phraseology, maritime lien by legal process, is one of the prominent attributes of a Court of Maritime Jurisdiction. A maritime lien is a legal claim or privilege which a person has on the ship, cargo, or thing to satisfy a demand or claim against it. It does not include or require possession like ordinary common law liens, but travels with the ship or thing (the *res*) into whosever's possession it comes. Proceedings *in rem* enable a plaintiff to enforce such specific lien on the property to which the lien attaches.

"The Dominion Maritime Jurisdiction Act of 1877 provides that the Maritime Court of Ontario shall have, as to inland waters of Ontario, all such jurisdiction as belong in similar matter within the reach of its process to any existing British Vice-Admiralty Court. The Imperial Act, 26 Vic., cap. 24, the Vice-Admiralty Courts Act of 1863, indicate the matters of which our Maritime Court have jurisdiction, namely:—Claims for seamen's wages, for master's wages, and for his disbursements on account of the ship; for pilotage; for salvage of any ship or vessel or of life or goods therefrom; for towage; for damage

done by any ship or collision; claims in respect of bottomry or respondentia bonds; claims in respect of any mortgage where the ship has been sold by a decree of the Court and the proceeds are under its control; claims between the owners of any ship or vessel touching the ownership, possession, employment or earnings of such ship or vessel; claims for necessities supplied in this Province to any ship or vessel of which no owner or part owner is domiciled within this Province at the time of the necessities being supplied; claims in respect of building, equipping or repairing within any British possession of any ship or vessel of which no owner is domiciled within the possession at the time of the work being done. These are the principal matters of which the new Court shall have jurisdiction. This Court shall not have jurisdiction in any prize cause or in any criminal matter, breaches of the regulations, relations relating to the Royal Navy, or of any seizure for breaches of the revenue laws, or of any violations of the Foreign Enlistment Act, or of the laws made relating to the abolition of the slave trade, or to the capture and destruction of pirates and piratical vessels, and other matters which were in former times decided in the Prize Court.

"The Governor-General in Council may from time to time appoint surrogate or substitute judges, who shall have such of the powers of the judge as may be conferred by his commission. Surrogate judges should be appointed at some of the prominent points as soon as possible.

"I have dwelt on this subject at some length, looking upon the matter as I do, as a subject of new interest and special importance to a large and meritorious class of people in Ontario. The 'Maritime Jurisdiction Act, 1877,' was enacted by Canadian legislation with the consent of the Imperial authorities, being the first time I believe that local legislation was employed to regulate maritime laws in the dominions of the Crown abroad any where. This all-important Act extends for the first time admiralty or maritime rules and jurisdiction to the great lakes, the inland seas, rivers, and canals of Ontario, and abrogates for ever the narrow and old fashioned ideas which confined the authority of maritime rules and laws within the ebb and flow of the tide, high water mark, and below the first bridge. For the future under our Maritime Act navigability, so far as the water is concerned, will be the true test of maritime jurisdiction.

"And why should it not be so? the navigation and water commerce of our great lakes, rivers, and canals are essentially the same as that carried on elsewhere within the ebb and flow of tides. It has been properly remarked by an intelligent American writer, that in all the arrangements in lake and river commerce, there is

## LAW SOCIETY, TRINITY TERM.

nothing to distinguish it from other maritime commerce of the world. There is not a contract or a wrong, not a want, right or a duty, not a construction, or a contrivance, a utensil, a material, or a supply, nor an agent of commerce, animate or inanimate, that is met with on the widest, the stormiest and saltiest ocean that has not its counterpart on these mighty lakes and rivers, and the same rules of law should prevail. A salvage, an average, a bottomry, a case of wages, of freight, tonnage, of wharfage and the like, on Lake Superior, Lake Huron, Georgian Bay, Lake Erie, Lake Ontario, and the River St. Lawrence, are as clearly cases of admiralty and maritime jurisdiction, and as much subject to the admiralty and maritime law, as similar cases in the Black Sea, the Bosphorus, the Dardanelles, the Baltic, the Irish Channel, the Straits of Magellan, or the Gulf of St. Lawrence. Their nature is the same everywhere, they are maritime everywhere, be the waters fresh or salt, having a tide or tideless, and for the future they will be the same in the Province of Ontario and Dominion of Canada."

Many cases have already been brought before this Court, and it is reasonable to suppose that its business will much increase as time goes on. There are to be three sittings in the year for the trial of contested cases, and the Judge holds Chambers once a-week. The Surrogate Judges have not yet been appointed, but we understand that they will be shortly.

We hope when any case of importance is decided to report it for the benefit of our readers.

## LAW SOCIETY

TRINITY TERM, 42ND VICTORIÆ.

The following is the *resumé* of the proceedings of the Benchers during this term published by authority :

Monday, 26th August, 1878.

In the absence of the Treasurer, Mr. D. B. Read was elected Chairman of Convocation.

The Report of the Examiners for Call

was read showing that the following gentlemen had passed their examination, namely, Messrs. H. P. Sheppard, I. Campbell, F. P. Betts, A. B. Aylsworth, R. Dulmage, H. T. Beck, M. Wilson, W. H. Ferguson, W. E. Higgins, T. Haslett, J. C. Hegler, F. W. Patterson, J. G. Kelly, E. L. Chamberlain, M. Sheppard, Jr., N. H. Ray.

Ordered that Messrs. Sheppard, Campbell, Betts, Aylsworth, Dulmage, Beck, Wilson, Ferguson, Higgins, Haskett, Hegler, Patterson, Chamberlain, Sheppard and Ray be called to the Bar.

Ordered that the following gentlemen be granted their certificates to practise as Attorneys, namely, Messrs. Sheppard, Haverson, Shepley, Jeffrey, Ross, Blackstock, Rolph, Barclay, Best, Dowsley, Haines, Lawrence and Going.

The Report of the Examiners upon the Intermediate Examinations was read and adopted.

The following gentlemen presented petitions which were read and referred to the Legal Education Committee, namely, Messrs. Sweet, Riordan, Taylor, Darling, Lane, Loughhead and Zimmerman.

Ordered that the recommendation of the Committee in the case of Joseph Cooper, Assistant in the Library, be adopted.

Thursday, 27th August.

Ordered that D. B. Read, Esq., Q. C., be chairman in the absence of the Treasurer.

Ordered that Elliott Travers be granted his certificate of fitness on production of his diploma and complete certificate of Mr. Peter McCarthy. The petitions of G. T. Goodeve and J. C. McCarthy were referred to the Legal Education Committee.

The Report of the Examining Committee on the Primary Examinations ---



## MR. JUSTICE KEOGH.

read, showing that the following gentlemen were entitled to be admitted as Students-at-Law and Articled Clerks, namely,—

*Graduates.*

William Riddell, John Graham, David Philip Clapp, Adam Johnston, George Gordon Mills, George William Beynon, John Henry Mayne Campbell, Charles Millar, Thomas Alfred O'Rourke, Edward Robert C. Proctor, Conrad Bitzer, John Russell, John William Russel.

*Matriculants.*

W. J. Taylor, Harry Thorpe Canniff, Thomas Parker, A. Douglass Ponton, Albert Edward Dixon, and, as an articled clerk, Eudo Saunders.

*Junior Class.*

J. L. Murphy, A. G. Clarke, W. B. Dickson, W. G. Wallace, T. K. Porteous, D. H. Tennent, M. S. McCraney, J. Telford, C. H. Clementi, W. Hawke, J. B. Paterson, J. W. Hanna, C. H. Cline, G. W. Danks, C. A. Hessin, P. E. Harding, C. Henderson, J. Campbell, J. G. Cheyne, F. E. Bertrand, T. Moffat, S. O. Richards.

*Articled Clerk.*

A. F. Godfrey.

Ordered that the Examiners be paid one hundred and thirty dollars for their services.

The Report of the Committee on Legal Education was adopted, recommending that after Hilary Term, 1879, the subjects for the Matriculation Examination of Students-at-Law be the same as those prescribed for each year by the University of Toronto for the Pass Examination at the Junior Matriculation of Students in the Faculty of Arts, with the option as to Greek or French and German as now prescribed, and that after the same Term the Law Society hold two examinations in each year, one at Michaelmas Term and one at Hilary

Term for the admission of Students-at-Law and Articled Clerks, and that the Matriculation Examination in the University of Toronto be substituted for the Primary Examinations of Students-at-Law during Easter and Trinity Terms.

September 6th, 1878.

The petition of Isidore F. Hellmuth was read and referred to the Committee on Legal Education.

The petitions of R. S. Neville and D. B. Robertson were referred to the same Committee.

The Report of the Finance Committee recommending a grant of \$150 to W. E. Hodgins to assist in the publication of the Ontario Legal Directory was adopted.

Mr. Read gave notice that he would next Term move that the Report of the Legal Education Committee on the subject of Primary Examinations of candidates for admission as students be reconsidered, that no action be taken thereon, and that it is inexpedient that students should be admitted to the Law Society on the Matriculation Certificate of any University.

## SELECTIONS.

## MR. JUSTICE KEOGH.

Few men have occupied a more prominent position or played a more active and distinguished part in the great drama of public life than the Right Hon. William Keogh, who has now passed away in most distressing circumstances. He was the eldest son of Mr. William Keogh, solicitor, of Corkip, in the County of Roscommon, and was born in Gardiner Street, Dublin, in the year 1817. His mother, to whom he was warmly attached, and of whom he boasted with filial pride that he inherited from her whatever talents he possessed, was before her marriage a Miss French, of Galway, an accomplished lady and of

## MR. JUSTICE KEOGH.

good family. He received his education in Dublin, and entered Trinity College, where he obtained honours. He possessed a taste for classical literature, and at an early period of his academical career applied himself, with an ardour which long survived his youth, to the study and practice of oratory. In the College Historical Society he found a field in which his cultivated gifts and acquirements had free scope and were stimulated by the excitement of debate and the successes which he achieved. He was also a member of another debating society connected with the Dublin Library. Both his argumentative skill and declamatory power won for him the highest distinction, and he soon rose to the foremost rank of spokesmen. On obtaining his degree he was called to the bar in 1847, and chose the Connaught circuit, with which he remained connected until his elevation to the bench. He did not devote his great abilities to the study of dry technical details, and never obtained distinction as a subtle pleader or profound lawyer; but he possessed the marvellous faculty of collecting the leading facts of a case and the salient points of law which might be applied to them with effect, and, above all the qualifications of an advocate, an eloquence which was always earnest and forcible, and at times so impassioned as to take the feelings if not the judgment of an audience by storm. He was appointed Solicitor-General in 1850. The pursuits of the bar did not afford sufficient employment for his oratorical abilities, and he conceived at an early period an ambition to enter Parliament. The desire was encouraged by friends connected with each of the two Government factions in the State; and it was no slight tribute to his popularity that he was wooed as a political ally by both. In 1850 the general election afforded an opportunity for gratifying his wish, and he offered himself as a candidate for the representation of Athlone, standing, it is said, as the *protégé* of Mr. Attwood, a wealthy English gentleman. He was opposed by Mr. Norton, the husband of Mrs. Norton, of literary fame; and there was a sharp encounter between them, which ended in Mr. Keogh's return. On that occasion he had a narrow

escape of meeting his fate. The place selected for the meeting was a large barn or outhouse; and he addressed the "free and independent" electors and non-electors from an open window space, the frames having been taken out for the purpose. A wooden bar was placed against the middle; and this was the only protection to the speaker. In the course of a vehement passage, in which he denounced his antagonism of the Government in a Demosthenic style—and, in fact, the words seemed to be translated from a philippic—he struck the bar with such vehemence as to displace it, and he was in imminent danger of falling into the yard below, when a reporter who was close beside him at once caught him by the arm and pulled him back. In the House of Commons his *prestige* as a speaker was great, and he delivered some impressive speeches which held the ear of the House. Among the most successful was an attack on Mr. Roebuck, and his denunciation of the Irish Ecclesiastical Titles Bill introduced by Lord John Russell. This won him great favour among the Roman Catholic clergy and people of Ireland, and he was regarded as a leading champion of the Church. This circumstance made their subsequent hostility the more bitter and implacable when he gave judgment in the Galway election case, unseating Captain Nolan and declaring Major Trench duly elected on the ground that the return of the former had been obtained by intimidation used by the Roman Catholic clergy, whose conduct he stigmatised with unsparing severity. His attack upon the Ecclesiastical Titles Bill was followed by a speech in the Rotunda, delivered in the presence of Cardinal Cullen and other prelates, on the defeat of the Aberdeen Coalition Ministry and the return of Lord John Russell to power. He accepted office in 1855 as Attorney-General. This acceptance first destroyed his popularity and exposed him to great obloquy. He had been a member of the party of independent opposition, and is reported to have made a speech on a festive occasion in Athlone, in which he took a vow that he would never take office under the Government. This has been represented as a solemn oath, and

## THE PROMOTION OF LORD CAIRNS.

he was held up to execration as a perjurer. No explanation of the actual facts, however, has ever been given, for he treated the attack on him with contemptuous silence. In 1856 he was raised to the bench as second justice of the Court of Common Pleas. His judicial career was remarkable for his fearless independence and resolution to vindicate the majesty of the law. Irrespective altogether of parties or persons, he castigated all whom he believed to deserve it, no matter what position they occupied or what relation they held towards him or others. It was his lot to be engaged in some election petition and other trials in which religious and political questions were mixed up, and his judgment was one almost certain to give offence to one party in the action. He incurred the resentment of each at different times, but chiefly by his Galway judgment. The undying enmity of the Roman Catholic priesthood and populace pursued him with relentless fury to his death-bed. His judgments are marked by great ability and outspoken condemnation of improper practices. He unseated Sir Arthur Guinness and Mr. Plunkett, the Conservatives, with as inflexible a determination as he unseated Mr. Whitworth and Captain Nolan, the Liberals. He was a sincere and earnest Roman Catholic, and was intolerant of clerical dictation and coercion, and never hesitated to denounce it. In this respect, notwithstanding the calumnies uttered against him, he was always consistent. One of his earliest and most remarkable speeches at the bar was a scathing denunciation of a priest at Sligo, who was prosecuted for horse-whipping a woman. His political views were Liberal in the largest sense; and this, as well as his genial manners, made him a favourite with the educated classes. In private life he was universally esteemed as a warm and generous friend and a most agreeable companion. His conversational powers were of a rare quality, marked by unflagging animation and a ready flow of wit and humour, which showed a pleasant if not a brilliant array around the convivial circle. He had a strong frame, and, until the last circuit, seemed to be in the enjoyment of good health; but

the first symptoms of decay then showed themselves, and were noticed with concern, but no one apprehended a collapse so speedy and so sad.

—*Law Journal.*

## THE PROMOTION OF LORD CAIRNS.

The public will learn with satisfaction a confirmation of the report that the Lord Chancellor was about to be advanced in the peerage. Lord Cairns enjoys the esteem alike of his colleagues and his party, of the public and of the profession of which he is the head. He has long been recognized as one of the most accomplished lawyers of his time, and he is universally trusted as a prudent, able, and conscientious statesman. Few even of his opponents, therefore, will grudge him his well-earned promotion to an Earldom. It seemed at one time, indeed, as if his health was likely to force him to relinquish an active share in politics. For a short period he occupied the position of leader of the Conservative party in the House of Lords when it was rendered vacant by the retirement of the late Earl of Derby; but, as he was compelled to resign this position on the ground of ill-health, it must have seemed more than doubtful whether he would be able to resume office on the return of his party to power. These apprehensions, happily, proved to be groundless. Lord Cairns became Lord Chancellor for the second time in 1874, and, to the satisfaction of all, his strength has been so far restored as to enable him to discharge without intermission the arduous duties of his high office, and to bear his share of responsibility in the prolonged and trying crisis through which the country has lately passed. That his powers, matured by time and experience, are still as great as they ever were, we have lately had abundant proof. Our readers will hardly have forgotten the great debate in the House of Lords last Session on the Constitutional question involved in the summons of troops from India. It was to Lord Cairns that the duty fell of explaining the acts and the policy of the

## THE PROMOTION OF LORD CAIRNS.

Government; his chief opponent was Lord Selborne, and the battle, therefore, was one of giants. If the issue was determined, as such issues commonly are, under a system of party government, by numbers quite as much as by argument, the contest between the two leading disputants was yet a keen and close one, and Lord Cairns showed throughout an unusually protracted address the courage of a statesman and the acumen of a consummate lawyer. It is both natural and according to precedent that when a great policy has been brought to a successful issue the national approval should find expression in the honours which are the proper and usual reward of statesmen. Every one will rejoice, therefore, that a proper meed of public approbation should fall to the share of the Lord Chancellor. He has fairly won his honours, and we must hope that he may long be spared to enjoy them.

The career of a great lawyer almost necessarily divides itself into two distinct parts, and the early brilliancy of the advocate is often eclipsed in the mature fame of the judge. It is well known that when Brougham first became Lord Chancellor he considered himself to have suffered in political prospects as well as in personal fortune by his enforced retirement from the Bar. It may have been in part owing to his premature promotion, as well as to temperament, that he never quite succeeded in sinking the advocate in the judge, nor the politician in the statesman. There has been no such abrupt solution of continuity in the career of Lord Cairns. He was elevated to the Bench and subsequently to the Woolsack, not so much for political reasons as on grounds of personal fitness, universally acknowledged without distinction of party. It hardly needs to be said that he had served his party ably and faithfully in Parliament; but it may be added that he had won the esteem of his opponents and the confidence of the public by his judicial temper and sagacity long before he quitted the Bar for the Bench. It is so long since he first became a Judge, that men have almost had time to forget his earlier career at the Bar and as a member of the House of Commons. They will recollect, however,

that no lawyer on either side was more highly esteemed than Sir Hugh Cairns; and if the fame of the Lord Chancellor has surpassed that of the former Solicitor and Attorney-General, it is not so much because the latter was insignificant as because Lord Cairns has continued to advance in public esteem. As Lord Chancellor in two Administrations he has more than fulfilled the promise of his earlier career, and his services both to his profession and to the State are fitly rewarded by his advancement to the rank of an earl.

The promotion of a Lord Chancellor to the higher ranks of the peerage is by no means a matter of course. From the Revolution in 1688 down to the year 1850 there were eighteen Lord Chancellors, several of whom held office more than once. But of these only eight in all became earls, and only seven by actual creation. The great Lord Somers, whom Horace Walpole described as "one of those divine men who, like a chapel in a palace, remain unprofaned while all the rest is tyranny, corruption, and folly," never became an earl, though the title was subsequently acquired by his descendants of a collateral branch. He was succeeded by Lord Cowper, who was created an earl in 1718. Lord Chancellor Harcourt only achieved the rank of viscount. Parker, the last Lord Chancellor who was impeached, became Earl of Macclesfield in 1721. Philip Yorke, who was Lord Chancellor from 1737 to 1756, was created Earl of Hardwicke in consideration of his long service to the State. "He valued himself," says Lord Chesterfield, "more upon being a great Minister of State, which he certainly was not, than upon being a great Chancellor, which he certainly was." But he was a man of great sagacity and uprightness, and, as another of his contemporaries said of him, when he rose in debate it seemed like public wisdom speaking. He was succeeded by Lord Henley, who ultimately became Earl of Northington. The mediocre Bathurst, who owed his promotion chiefly to his respectable mediocrity, became an earl by succession, not by creation. Like his successor, Lord Thurlow, he had to smart under the caustic sarcasm of the incorrigible John

## HAS THE 29TH OF FEBRUARY A LEGAL EXISTENCE.

Wilkes. When the latter was elected Lord Mayor, Bathurst is said to have contemplated annulling the appointment on the ground of unfitness. "If his Lordship disallows my nomination," said Wilkes, "I shall have to petition His Majesty to remove the Lord Chancellor on the ground of incompetence." The Chancellor yielded to the affront and sanctioned the appointment. Wedderburn, who held the Great Seal with the title of Lord Loughborough, was created Earl of Rosslyn before his death, but the name of Loughborough is the one which is associated with his tenure of office. Lord Eldon, the consummate lawyer, and almost the last of those stern and unbending Tory statesmen to whom the first Reform Bill seemed like the letting loose of a new and destructive deluge, was made an earl in 1821, after he had held the Great Seal for eighteen years in all, and for thirteen consecutively. After Lord Eldon's retirement no Lord Chancellor was made an earl until Lord Cottenham's promotion on his retirement in 1850. Brougham and Lyndhurst, like the successors of Lord Cottenham up to the present time, did not rise beyond the rank of baron. We will not pretend to say whether the precedent of Cowper and Macclesfield, of Hardwicke and Eldon, is more worthy of imitation than that of Somers and Thurlow, of Erskine, Lyndhurst, and Brougham, but we are sure that the public judgment will trouble itself little about precedent, and will only see in the Lord Chancellor's promotion the well-earned reward of a laborious, an honourable, and a blameless career.—*Times*.

## HAS THE 29TH OF FEBRUARY A LEGAL EXISTENCE?

This apparently simple question was recently decided in one of the Inferior Courts of Indiana, in the affirmative (6 *Cent. Law Jour.*, p. 301). The same question it appears was formerly presented to the Indiana Supreme Court, in *Swift v. Toucey*, 5 Ind. 196, but was only incidentally passed upon; Stuart, J., in that case referring to the statute, 21 Hen. III., *de bissextili anno*, and saying: "This ancient statute being prior to 4 James I.,

made in aid of the common law, and not inconsistent with our institutions, *would seem to be in force in this State*."

Following this *dicta* it was held in *Craft v. The State Bank of Indiana*, 7 Id. 219, that a note dated February 25, 1848, at ninety days, payable in Indiana, was payable May 29, and that the protest May 27, was premature. The Court say: "If the 28th and 29th days of February in the bissextile year are to be treated as one day, the demand was premature," citing *Swift v. Toucey*. In *Kohler v. Montgomery*, 17 Id. 220, the same question arose, and presentment was held premature, with the statement, "Commercial February has but twenty-eight days;" and in *Porter v. Holloway*, 43 Id. 35, the same ruling was adhered to.

In the case before Judge Mallott (*Tranter v. Helphenstine*), it appeared that the Indiana statute requires a summons to be served *ten days* before the return day. The summons was served February 25, and judgment taken by default March 6. And it was claimed that, the 29th of February intervening, there was a previous service of *nine days* only, and the Court acquired no jurisdiction.

As the Indiana decisions on the subject rest upon the *obiter dictum* in *Swift v. Toucey*, and the statute 21 Hen. III., had never been examined by the Supreme Court in any of the cases decided, the learned Judge considered himself at liberty to look into the question independently of the ruling of the Supreme Court.

First, said the Court, as to the proposition that, commercial February has but twenty-eight days. If it be true that, by the rules of the law merchant, February has but twenty-eight days, it is reasonable to presume that, in some of the numerous and exhaustive works upon bills, notes, and commercial law, the rule would be found laid down as a part of the law. I have pretty thoroughly examined the English and American reports and digests, and have found no case holding that doctrine. It is not found in the works of Kent, Story, Parsons, Byles, or Daniels. In "Edwards on Bills," 513, it is stated that February 28 and 29 count as one day; but the author cites only the statute 21 Hen. III., and a

Chan.]

NOTES OF CASES.

[Chan.]

local statute of New York in support of it. In "Chitty on Bills," a large number of British statutes are cited; but the statute 21 Hen. III., is not even referred to. But the learned author inferentially controverts the doctrine declared in *Kohler v. Montgomery*. He says: "On a bill dated January 28, 29, 30, or 31, and payable one month after date, the time expires on February 28, in common years; and, in the three latter cases (January 29, 30, 31), in leap year on the 29th."

After a critical examination of the English statute, the Court decided that it was intended to settle the "year and a day," within which time certain acts in the English practice were required to be performed; and it dealt with the year as an entirety, and had no relation to fractional parts of the year, whether expressed in days or months. "No one would think," said the Court, "that the statute in question required that the 28th and 29th days of February should be regarded as having only twelve hours each. Is a man who works on February 28 and 29 to have pay for one day only? Is one who borrows money on February 27, for one day only, entitled to the use of it for one day longer—and that, too, without interest? Has a judgment, rendered February 28, no priority as a lien over one rendered on February 29? Could a man, sentenced to be hung on February 29, be legally executed on February 28? Could a man, indicted for selling whisky on Sunday, February 29, escape punishment on the plea that he sold the liquor on the latter part of Saturday, February 28?" The service, therefore, was held to be sufficient. — *Washington Law Reporter*.

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### CHANCERY.

V.-C. Proudfoot.]

[October 23.]

FLEURY v. FLEMING.

*Injunction—Simple contract creditor.*

*Held*, following the decision in *Abell v. Morris*, 23 Grant, 109, that a creditor by simple con-

tract was entitled to an injunction to restrain his debtor from disposing of his property with a view of evading execution, although the creditor had not obtained judgment: *St. Michael's College v. Merrick*, 1 App. R. 520, referred to and distinguished.

V.-C. Proudfoot.]

[October 23.]

GOULD v. STOKES.

*Will, construction of—Conversion into personalty.*

A testator directed his executors to sell and realize all his estate in such manner as they should think proper, and the residue, after sundry devises and bequests, he desired them to divide into certain shares, one of which he directed to be equally divided among the daughters of his son, S. V., deceased, to be paid to them on their attaining 21, or sooner if the executors should think it for their advantage; and in the event of the death of any of his granddaughters without leaving issue, her or their shares to be equally divided among their surviving sisters or their heirs.

*Held*, that this operated as a conversion of the estate into personalty, and the words "dying without leaving issue" referred to the period of distribution; that is, when the legatees attained 21; and, therefore, that the share of one of them who had died after the testator, and after having attained 21, without issue, went to her personal representatives.

V.-C. Proudfoot.]

[October 23.]

OWSTON v. GRAND TRUNK RAILWAY CO.

*Purchase of right of way—Tenant pour autre vie—Demurrer.*

The bill alleged that tenants *pour autre vie* had sold and conveyed to a railway company land for their roadway. After the ceaser of the life estate the parties entitled in remainder filed a bill against the vendors and the company, seeking discovery as to what estate or interest the vendors had conveyed, stating that the company alleged they had paid the vendors the full price of the fee in the land, and that they (the vendors) were liable to account for the price so paid, and prayed for an account and payment to the plaintiffs of a proper share or proportion thereof:

*Held*, on demurrer by the vendors, that no sufficient ground of equity was alleged against them; the plaintiffs, however, to be at liberty to amend their bill as they should be advised.

## ELECTION CASES—DIGEST OF ENGLISH LAW REPORTS.

## CANADA REPORTS.

## QUEBEC.

## ELECTION CASES.

## SUPERIOR COURT.—[IN CHAMBERS.]

## IN RE MONTREAL CENTRE ELECTION.

*Election—Count—Ballots opened by Returning Officer.*

*Held*, where the returning officer opened the envelopes containing the ballots as transmitted by the deputy-returning officers, that the Judge could not recount the ballots under section 55 of the Dominion Election Act.

[Montreal, September 30, 1878.]

An election having been held for Montreal Centre, and an application having been made under section 55 of the Election Act for a count of the ballots by a Judge, it appeared that the returning officer had removed the ballots from the envelopes in which they had been transmitted to him by the deputy-returning officers, and had made them into two packages.

*Devlin*, and *Archambault*, Q.C., for petitioner.

*Lacoste*, Q.C., and *Curran*, Q.C., for respondent.

*RAINVILLE*, J., said the law was very clear and precise, that the ballots as transmitted by the deputy-returning officers should remain in the same state until opened by the judge, on a demand being made for a count. The returning officer in the present case had, therefore, exceeded his duty in opening the envelopes. Under the circumstances, His Honour said he could do nothing, and he would declare the impossibility of taking any action, and leave the returning officer to adopt such course as he might be advised. Each party to pay his own costs on this application.\*

## ENGLISH REPORTS.

## DIGEST OF THE ENGLISH LAW REPORTS FOR MAY, JUNE, AND JULY, 1878.

(From the *American Law Review*.)

ACCEPTANCE.—See CONTRACT, 3.

ACCOUNT OF PROFITS.—See PARTNERSHIP, 1.

ACCUMULATION.—See WILL, 2.

\* The judgment of Hagarty, C.J., in the Centre Wellington case, to be hereafter reported, would seem to throw doubt on this decision.—ED. L. J.

ACQUIESCENCE.—See PRINCIPAL AND AGENT.

ACTION.—See HUSBAND AND WIFE, 2.

ADEMPMENT.—See WILL, 5.

ADJACENT SUPPORT.—See DAMAGES.

ADMINISTRATION.—See MORTGAGE, 1.

ADVANCEMENT.—See ANNUITY, 2.

AFFIDAVIT.—See SOLICITOR.

AGENT.—See PRINCIPAL AND AGENT.

AGREEMENT.—See CONTRACT, 2.

## ANNUITY.

1. Testator gave some annuities, and then bequeathed his personal estate not specifically disposed of to trustees, "to stand possessed thereof upon trust, out of the income thereof to pay and keep down such of the annuities hereinbefore bequeathed as for the time being shall be payable, and subject thereto" upon other trusts. The income of the personal estate was less than the amount of the annuities. *Held*, that the deficiency should be made up out of the capital.—*In re Mason*. *Mason v. Robinson*, 8 Ch. D. 411.

2. By a deed of separation made in 1860, between M. and his wife, he covenanted to pay each of their six daughters an annuity of £200, to cease, in each case, if M. and his wife should come together again. The wife died in 1871, and M. in 1874, the latter intestate. They had had not lived together again. *Held*, that the annuities paid during M.'s life were not advancements, and that the value of the annuities at the death of M. should be brought into hotchpot.—*Hatfield v. Minet*, 8 Ch. D. 136.

ANTICIPATION.—See HUSBAND AND WIFE, 1.  
MARRIED WOMEN, 1.

APPOINTMENT.—See SETTLEMENT.

## ARBITRATION.

The plaintiff and the defendants, G., N., F., all British subjects, entered into partnership articles for carrying on business in Russia, with the head office at St. Petersburg. The articles were in the Russian language, and registered in Russia. G. and N. had the privilege to demand back their capital within a year; and, if their demand was not satisfied within a month, they could wind up the firm. "In case of any disputes arising between the parties, . . . such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg commercial court. . . . The decision of such court shall be final." G. and N. duly demanded their capital, and took steps in Russia to secure it by winding up proceedings. The plaintiff thereupon began an action in England, alleging that there were parts to their agreement, all executed in England, although one was translated into Russian, and by one of the English parts he was to have compensation for the withdrawal of

## DIGEST OF ENGLISH LAW REPORTS.

G. and N ; that the proceedings for winding up were taken without his knowledge and consent ; and that they were invalid, and not according to Russian law. He claimed a dissolution, compensation according to the English agreement, and the appointment of a receiver in England. Defendants moved for a reference of all matters to St. Petersburg. *Held*, that the agreement in the articles to refer was a good arbitration clause under the Common-Law Procedure Act, 1854, and a stay of proceedings was ordered to await the result of proceedings in the Russian court.—*Lap v. Garrett*, 8 Ch. D. 26.

## ATTORNEY AND CLIENT.

1 Shipowners sued the charterers for not discharging the cargo according to the charter-party, and in a subsequent action the charterers resorted to their remedy over against the merchant on the contract of sale. *Held* : that correspondence between the charterers and their solicitor in the first action, and between their solicitor and the shipowners' solicitor and relating to the question in the second action, were privileged, and need not be produced in the second action.—*Bullock v. Corry*, 3 Q. B. D. 356.

2 In an action by a company against its former engineer for money wrongly charged to it in the final account with him, the defendant applied for inspection of three documents scheduled in the plaintiff's affidavit of discovery, and consisting of shorthand notes of conversations, between an officer of the company and the chimney-sweep, and between the chairman of the company and the present engineer, and a statement of the facts drawn up by the chairman, all prepared for submission to plaintiff's solicitor for his advice as to their action, two of which had already been submitted to him. Refused, on the ground that the documents were privileged.—*The Southwark and Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315.

See SOLICITOR.

AUCTION.—See SALE, 3.

## BEQUEST.

S. died in 1628, leaving a will containing a bequest of £1,000 for "the relief and use of the poorest of my kindred, such as are not able to work for their living, *videlicet*, sick, aged, and impotent persons, and such as cannot maintain their own charge. . . . And my will is, that in bestowing . . . my goods to the poor charitable uses, which is, according to my intent and desire, those of my kindred which are poor, aged, impotent, or any other way unable to help themselves, shall be chiefly preferred." The income from the charity fund became very large. *Held*, that the bequest was a charity ;

that the objects of it were primarily the kindred of the testator, actually poor ; and if, after such were provided for, something remained, it should be applied to the relief of poor persons in general, by the doctrine of *cy près*. A well-to-do person among the kindred could not take, although by comparison "poorer" than some others of the kindred. *Dictum* of WICKENS, V.-C., in *Taylor v. Gillham* (L. R. 16 Eq. 581), criticised.—*Attorney-General v. Duke of Northumberland*, 7 Ch. D. 745.

See TRUST, 2 ; WILL, 5.

BILL OF LADING.—See SALE, 2.

BILL OF SALE.—See SALE, 4.

## BILLS AND NOTES.

A check had been given for a debt, when a trustee or garnishee process was served upon the debtors, whereupon they ordered payment on the check to be stopped. The check had not been presented. *Held*, that the stopping of payment of the check revived the debt, and the debt was held by the trustee process.—*Cohen v. Hale*, 3 Q. B. D. 371.

See SALE, 2.

BONUS.—See WILL, 5.

BOUNDARY.—See LANDLORD AND TENANT, 2.

BURDEN OF PROOF.—See SLANDER.

BY-LAWS.—See RAILWAY, 2.

CANCELLATION OF STOCK.—See COMPANY, 1.

CARRIER.—See COMMON CARRIER.

CAUSA PROXIMA.—See NEGLIGENCE, 1.

CHARITY.—See BEQUEST ; TRUST, 1 ; WILL, 4.

CHECK.—See BILLS AND NOTES.

CLASS.—See WILL.

COLLUSION.—See JUDGMENT.

COMMON CARRIER.—See RAILWAY.

COMPOUNDING FELONY.—See SURETY.

CONCEALMENT.—See SURETY.

CONDITION.—See SALE, 3 ; WAIVER.

CONSIDERATION.—See SALE, 4 ; SETTLEMENT, 1.

CONSTRUCTION.—See ANNUITY, 1 ; BEQUEST ;

CONTRACT, 1 ; LANDLORD AND TENANT, 1 ;

RAILWAY, 2 ; TAXES ; WILL, 1, 2, 3, 4.

## CONTRACT.

1. Contract in writing, by plaintiffs, to cut and lengthen and repair defendant's ship, "to enable the vessel to be classed 100 A 1" at Lloyd's, for £17,250 and the old material. Reference was made for details to specifications annexed to and forming part of the contract. These specifications consisted of two items, headed respectively "lengthening" and "iron-work." Under the first were particulars stating, among other things, that all the "iron and wood work" of certain portions of the vessel named was to be "new and complete," and every way "in accordance with Lloyd's rules to class the vessel A 100." The other it



## DIGEST OF ENGLISH LAW REPORTS.

read as follows: "The plating of the hull to be carefully overhauled and repaired [but if any new plating is required, the same to be paid for extra]." "Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with Lloyd's rules for classification." The words standing above in brackets were erased, but left legible, and were signed by certain initials. *Held*, in an action for extra pay for new plating, that, if new plating was required to render the ship 100 A 1 at Lloyd's the plaintiffs were obliged, according to the contract, to furnish it without extra pay, and that the erased words could not be used as proof of the intention of the parties. —*Inglis v. Buttery*, 3 App. Cas. 552.

2. Action for specific performance of an agreement by defendant to take at par 2,000 shares in the plaintiff company, at such times as should "be required for the purposes of the company." At the time of the above agreement, the directors of the company agreed to pay the defendant, "in consideration of his services," £4,000, by a draft payable in twelve months from date, and to be dated on the day when he should pay for the said 2,000 shares in full. The directors had no authority to issue shares below par. The defendant set up in defence that he had rendered no services to the company, and that the object of the two agreements was to issue shares to him at a discount; that the two agreements formed in fact only one contract, and the two parts were made separate, in order to enable the directors to evade said limit on their powers, and he asked to have his name removed from the list of subscribers. *Held*, that he must take and pay for the shares in full. He could not set up the fraud of the directors, in which he had colluded, in order to invalidate the contract, and the contract was divisible. He was left to another action to recover his £4,000 if he could.—*Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235.

3. The plaintiff wrote the defendant's agent for the sale of a leasehold as follows: "In reference to Mr. J.'s premises . . . I think £800 . . . about the price I should be willing to give. Possession to be given me within fourteen days from date. . . . This offer is made subject to the conditions of the lease being modified to my solicitor's satisfaction, which I am informed can be done." A few days afterwards the agent wrote: "We are instructed to accept your offer of £800 for these premises, and have asked Mr. J.'s solicitor to prepare contract." The lease was modified as required by plaintiff's solicitor. *Held*, that the two let-

ters formed a complete contract.—*Bonnesell v. Jenkins*, 8 Ch. D. 70.

See CORPORATION; SALE, 1, 2; SURETY.

CONTRIBUTION.—See SALVAGE, 2.

CONVERSION.—See INSURANCE; SETTLEMENT, 2; WILL, 1, 5.

## COPYRIGHT.

Defendant adapted a plan from a French novel and drama, in which it was found as a fact that he had introduced two unimportant "scenes or points" or "scenic representations" already used by plaintiff in an adaptation previously made by him, but which had no counterpart in the French original. *Held*, that, under the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15, § 2, the defendant was not liable, inasmuch as the portions taken were not material and substantial.—*Chatterton v. Cant*, 3 App. Cas. 483; s. c. L. R. 10 C. P. 572; 2 C. P. D. 42; 10 Am. Law Rev. 464; 11 id. 690.

## CORPORATION.

By Act of Parliament, it was provided that every contract above £50, made by a public corporation like the defendant, should "be in writing, and sealed with the common seal" of the corporation. The jury found that the defendant corporation verbally authorized its agent to order plans for offices of the plaintiff; that the plans were made, submitted, and approved; that the offices were necessary, and the plans essential to their erection; but the offices were not built. *Held*, that the plaintiff could not recover. Distinction between trading and public corporations.—*Hunt v. The Wimbledon Local Board*, 2 C. P. D. 208.

See COMPANY.

## COSTS.

Where a defendant admitted his liability for the debt sued on, and set up a counterclaim exceeding the plaintiff's in amount, the defendant was refused security for costs against the plaintiff, as being a foreigner, residing out of the jurisdiction.—*Winterfield v. Bradnum*, 3 Q. B. D. 324.

See MORTGAGE, 1.

COVENANT.—See LANDLORD AND TENANT, 1, 3; PARTNERSHIP, 1.

COVERTURE.—See MARRIED WOMEN.

COVIN.—See JUDGMENT.

CY-PRES.—See BEQUEST.

## DAMAGES.

In an action for damages, injury to plaintiff's buildings by the withdrawal of lateral support through mining operations carried on by the defendant on the adjacent land, a referee found £400 damages already accrued, and £150 prospective damages. *Held* (COCKBURN, C. J.,

## DIGEST OF ENGLISH LAW REPORTS.

dissenting), that prospective damages could be recovered. *Backhouse v. Bonomi* (9 H. L. C. 503) and *Nicklin v. Williams* (10 Ex 259) discussed.—*Lamb v. Walker*, 3 Q. B. D. 389.

See NEGLIGENCE, 1; TRADE-MARK, 2.

DEED.—See MORTGAGE, 2.

DELIVERY.—See RAILWAY, 3; SALE, 2.

DEMURRER.

Claim that the defendants, by placing refuse and earth on their land, caused the rain-water to percolate through and flow upon the plaintiff's adjoining land and into his house, as it would not naturally do, and that substantial damage was caused thereby. *Held*, not demurrable.—*Hurdman v. The North Eastern Railway Co.*, 3 C. P. D. 168.

DEVISE.—See TRUST, 1; WILL, 1.

DIRECTOR.—See COMPANY, 3.

DISCOVERY.—See ATTORNEY AND CLIENT, 1, 2.

DISCRETION OF TRUSTEES.—See TRUST, 2.

DISTRIBUTION.—See ANNUITY, 2.

DIVISIBLE CONTRACT.—See CONTRACT, 2.

DOCUMENTS, INSPECTION OF.—See ATTORNEY AND CLIENT, 2.

DOMESTIC RELATIONS.—See HUSBAND AND WIFE.

ERASURES.—See CONTRACT, 1.

EVIDENCE.—See CONTRACT, 1; SLANDER; WILL, 1.

EXCHANGE, BILLS OF.—See BILLS AND NOTES.

EXECUTION.

Sect. 87 of the Bankruptcy Act, 1869, provides that "where the goods of any trader have been taken in execution for a sum exceeding £50" within a specified time before bankruptcy, proceedings on it shall be restrained. Appellants got judgment for £54, but endorsed the writ for £43 only. *Held*, that the execution was good for that sum, notwithstanding the judgment for more than £50.—*In re Hinks. Ex parte Berthier*, 7 Ch. D. 882.

EXTRINSIC EVIDENCE.—See WILL, 1.

FENCE.—See NEGLIGENCE, 2.

FIRE INSURANCE.—See INSURANCE.

FORECLOSURE.—See MORTGAGE, 1, 2.

FOREIGN TRIBUNAL.—See ARBITRATION.

FRAUD.—See CONTRACT, 2; SALE, 1, 4; TRADE-MARK, 2.

FRAUDS, STATUTE OF.—See SALE, 3.

FUTURE DAMAGE.—See DAMAGES.

GARNISHEE PROCESS.—See BILLS AND NOTES.

HOTCHPOT.—See ANNUITY, 2.

HUSBAND AND WIFE.

1. A wife's property was, on her marriage, settled to her separate use, without power of

anticipation. A judgment was obtained in the Queen's Bench against her for debts contracted previous to her marriage; and, in an action in the Chancery Division, to enforce this judgment against her separate estate, *held*, that the judgment debt and costs should be recovered against her separate estate, in spite of the restraint against anticipation in the settlement, under the Married Women's Property Act, 1870, which provides that "the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts [contracted before marriage] as if she had continued unmarried."—*London & Provincial Bank v. Bogle*, 7 Ch. D. 773.

2. When a wife sues for separate estate, the husband should be made a defendant, not a plaintiff. The Judicature Act has not changed the practice.—*Roberts v. Evans*, 7 Ch. 830.

3. Under the Married Women's Property Act, 1870, the husband must still be joined as defendant when an action is brought against the wife to charge her earnings in a pursuit carried on by her apart from her husband.—*Hancocks v. Demerit-Lablache*, 3 C. P. D. 197.

See MARRIED WOMEN.

IMPLIED TRUST.—See TRUST, 1.

INCOME.—See ANNUITY, 1.

INFANT.

By the marriage settlement, made under the direction of the court, of a young lady then "an infant of seventeen years and upwards," certain property of hers was vested in trustees, among other things to reinvest the same, "with the consent of" the said infant and her husband, and after the death of either with the consent of the survivor, at the discretion of the trustees. The wife had the first life-interest. *Held*, that the wife, though an infant, could give her "consent" to a reinvestment, as contemplated by the settlement. She could exercise a power, though coupled with an interest.—*In re Cardross's Settlement*, 7 Ch. D. 728.

See SETTLEMENT, 1.

INJUNCTION.—See PARTNERSHIP, 2; TRADE-MARK, 1, 2; WAY.

INSURANCE.

By the terms of a lease, dated Sept. 29, 1870, the lessee had the option to purchase the premises at an agreed price, by giving notice before Sept. 29, 1876, of his intention to do so. The lessor covenanted to insure, and did insure. May 6, 1876, the buildings were burnt down, and the lessor received the insurance money. Sept. 28, 1876, the lessee gave notice of his intention to purchase, and claimed the insurance money as part payment. The lease contained

## DIGEST OF ENGLISH LAW REPORTS.

nothing as to the disposition of the insurance money. *Held*, that the lessee was not entitled to it. *Laves v. Bennett* (1 Cox 167) criticised; *Reynard v. Arnold* (L. R. 10 Ch. 386) explained.—*Edwards v. West*, 7 Ch. D. 858.

INTENTION.—See CONTRACT, 1.

INTEREST.—See WAIVER.

JOINT TENANT.—See TRUST, 1.

## JUDGMENT.

The plaintiff sued defendants, to recover a penalty for violation of the Sunday statute, 21 Geo. 3, c. 49. The action was brought Aug. 17, 1877, in respect of a violation of Sunday, August 15. October 20, one R. brought suit against the defendants to recover for all the Sundays from and including August 15, to the date of the writ. Judgment in this suit went by default, and was pleaded in bar by defendants when plaintiff's suit came up. It appeared that defendant's attorney got R. to allow the use of his name to bring the suit, in order to cut off suits by others for the penalty, and in order to gain time to apply to the Home Secretary for a remission of the penalties; that R. never intended to enforce the judgment, or to have any thing further to do with the matter, but that he did not know of the suit brought by the plaintiff. *Held*, that R.'s judgment was obtained by covin and collusion, and could not be pleaded in bar of plaintiff's suit; and, moreover, the claim of plaintiff for the penalty became a debt from the date of his writ, and was not affected by subsequent suits.—*Girdlestone v. The Brighton Aquarium Co.*, 3 Ex. D. 137.

See EXECUTION.

JURISDICTION.—See ARBITRATION.

LACHES.—See PRINCIPAL AND AGENT.

## LANDLORD AND TENANT.

1. In a lease of a large new warehouse, the lessor covenanted that he would "keep the roof, spouts, and main walls and main timbers of the warehouse in good repair and condition." There was also a provision, that, "in case the said warehouse . . . shall . . . be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," there should be a reduction or discontinuance of rent until the building should be again tenantable. While the warehouse was being used by the tenant in a reasonable manner for the purpose which it was let for, the upper-floor beams broke, and two of the outer walls cracked and bulged, so that extensive repairs were made by the lessor, during the progress of which the tenant could not occupy the building. The lessor brought an action against the lessee for the amount expended in repairs, and the latter made a coun-

ter-claim for the rent paid by him under protest in respect of the time consumed in making the repairs. *Held*, that the covenant to keep "in good repair" meant such a condition as such buildings must be in, in order to answer the purpose for which they are used. If this particular building was in poor repair when leased, it was not enough to keep it merely in that condition. The lessee could not claim a rebate of rent under the clause "or other inevitable accident," nor any damages for occupation during the repairs, as the covenant to repair implied leave to enter for that purpose. *Saner v. Bilton*, 7 Ch. D. 815.

2. A tenant is bound to keep the boundary between his landlord's land and his own distinct and well defined during the continuance of the lease, as well as to render it so at the end of the lease.—*Spike v. Harding*, 7 Ch. D. 874.

3. Lease by defendant to plaintiff of a basement, "together with the full and undisturbed right and liberty to store cartridges therein." The lessor covenanted to keep the premises and the landing-pier adjoining in proper repair and condition "for storing, landing, or shipping away cartridges;" and there was a covenant for quiet enjoyment. Before the lease ran out, the Explosive Act, 1875, rendered it no longer lawful to keep cartridges in the premises. Defendant gave plaintiff notice to remove the cartridges; and plaintiff refusing, defendant removed them himself. Plaintiff brought an action on the lease to restrain defendant from obstructing the storing of the cartridges, and to require him to render it possible for cartridges to be lawfully stored on the premises, and for damages. *Held*, reversing the decision of Fry, J., that judgment must be for the defendant.—*Newby v. Sharpe*, 8 Ch. D. 39.

See INSURANCE; NEGLIGENCE, 2; WAY.

LEASE.—See INSURANCE; LANDLORD AND TENANT; NEGLIGENCE, 2; PARTNERSHIP, 2; WAY.

LEGACY.—See WILL, 5.

LETTERS, CONTRACT BY.—See CONTRACT, 3.

LIBEL.—See SLANDER.

LICENSE TO ENTER.—See LANDLORD AND TENANT, 1.

LIEN.—See SALE, 2.

LIFE-ESTATE.—See MARRIED WOMEN, 2; WILL, 5.

LUGGAGE.—See RAILWAY, 1, 3.

MAINTENANCE AND EDUCATION.—See TRUST, 2.

MARKET OVERT.—See SALE, 1.

MARRIAGE SETTLEMENT.—See INFANT; SETTLEMENT.

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

## MARRIED WOMEN.

1. A testatrix bequeathed to her "niece M. J., the wife of R. H.," a share in a fund resulting from real and personal estate, after the termination of a life-interest in the same. The testatrix further declared that every provision made for any woman in the will was made and intended to be for her sole and separate use, without power of anticipation, and that her receipt alone should be a sufficient discharge for the same. The tenant for life died before the testatrix, and the fund had been ascertained and paid into court. *Held*, that it should be paid out to her on her separate receipt.—*In re Ellis's Trusts* (L. R. 17 Eq. 409) commented upon.—*In re Croughton's Trusts*, 8 Ch. D. 460.

2. T. was married in 1846, and became insolvent in 1861, and had no assets. In 1876, his wife became entitled under her father's will to £500 a year for life, remainder to her children. The will did not settle the income to her separate use, and there was no marriage settlement. The husband contributed nothing to the wife's support. The general assignee claimed half the income for the creditors. *Held*, that the court could settle it all on the wife, in its discretion; and such settlement was made.—*Taunton v. Morris*, 8 Ch. D. 453.

See HUSBAND AND WIFE.

## MORTGAGE

1. A mortgagor was obliged to take out letters of administration, in order to perfect the title of the mortgaged premises to the mortgagee. In an action for foreclosure and payment of the sum due on the mortgage, *held*, that the mortgagor was not entitled to have the costs of taking out the letters paid out of the mortgaged property.—*Saunders v. Dunman*, 7 Ch. D. 825.

2. *Held*, that a person mentioned in a deed with two others, as a party to it, but who never executed it, could not maintain an action to have the deed declared void. *Held*, also, that one of three co-mortgagees could not maintain an action to foreclose, making the mortgagor and his two co-mortgagees defendants.—*Luke v. South Kensington Hotel Co.*, 7 Ch. D. 789. 4

See SETTLEMENT, 2; WAIVER.

MORTMAIN ACT.—See WILL, 4.

## NEGLECT.

1. The defendant used his premises for athletic sports. A private passage, having a carriage-track and footpath, ran by his place, the soil of which passage belonged to other parties, but over which there was a right of way. In order to prevent people in carriages from driving

up the road to his place to see the sports over the fences the defendant, without legal right, and, as found by the jury, in a manner dangerous to persons using the road, barricaded the carriage-road by means of two hurdles, one placed on each side of the road, leaving a space in the centre, which was ordinarily left open for carriages, but on occasion of the games was closed by a bar. Some person unknown moved one of the hurdles from the carriage-road to the footpath alongside. The plaintiff, passing over the road in a dark night in a lawful manner, and without negligence, came in contact with the obstruction on the footpath, and had an eye put out thereby. *Held*, that the defendant was liable for the injury.—*Clark v. Chambers*, 3 Q. B. D. 327.

(To be continued.)

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION QUESTIONS.

FIRST INTERMEDIATE EXAMINATIONS :  
TRINITY TERM, 1878.

## Equity.

1. "Equity will not suffer a wrong without a remedy." Explain this maxim.
2. What declaration of trust must be proved by writing?
3. What was the object of the statute 13 Elizabeth, cap. 5?
4. What is an implied trust?
5. It is said that "Equity never wants a trustee." What is the meaning of this expression?
6. In the case of a written contract for the sale of lands, the vendor refusing to carry out the contract, what remedy has the vendee (a) At Law, (b) In Equity?
7. Explain the rule as to the appropriation of payments.

Smith's Common Law—Con. Stats. U. C.  
Caps. 42 & 44, and Amendments.

1. Define "Mayhem." When is it excusable?
2. In how far is the utterer of a mere repetition of a slander liable, when he is not the author of the scandal? Would such repetition make any difference in the liability of the original utterer, and if so, under what circumstances?
3. What is the meaning of the technical term "parol contract"?

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

4. Under what circumstances can a distress for rent be made upon land in respect of which the rent is not payable and not included in the demise?

5. Sketch shortly, as laid down by Mr. Smith, the duties and liabilities of a Solicitor to his client.

6. What is necessary to constitute a binding acceptance of a bill of exchange? Give reasons for your answer.

7. Under what circumstances will a person making a representation as to the credit of another be liable on such representation? Give reasons for your answer.

## SECOND INTERMEDIATE.

*Equity.*

✓ 1. What is the extent of the duty of a mortgagee in possession as to keeping the mortgaged premises in repair?

✓ 2. What is a lien? Give an illustration of an equitable lien.

✓ 3. What is meant by "the wife's equity to a settlement?" In your answer, shew the grounds for the interference of equity with the legal rights of the husband.

✓ 4. Under what circumstances will the Court of Chancery remove children from the custody of their father and place them under the care of a third person to act as guardian?

5. Under what circumstances will inadequacy of consideration constitute a ground for setting aside a bargain, and when not?

✓ 6. What is an injunction? What is its object?

✓ 7. What is a bill of discovery?

*Broom's Common Law and Statutes.*

1. Define a writ of "prohibition. To what class of cases is it applicable?

2. What difference is there between the liability (a) of the heir, (b) the personal representative of an obligor where neither is named in the bond?

3. Discuss the question whether a representation can be fraudulent if the person making it have no knowledge of its falsehood?

✓ 4. What should be shown by a plea of "no consideration" in an action by the endorsee against the acceptor of a bill? Give reason for answer.

✓ 5. In how far does a pawnbroker warrant the title to goods when he sells them merely as a forfeited pledge without further undertaking in regard to them?

6. What statutory provision is made for

the examination of officers of a corporation by judgment creditors of the corporation?

7. Give Mr. Broom's definition of a crime.

## CERTIFICATE OF FITNESS.

*Equity.*

1. State generally the cases in which relief will and in which it will not be given on the ground of accident.

2. Define shortly the law with regard to the right of a person who has made improvements on the lands of another to an allowance therefor (1) before any statutory provisions, (2) since statutory enactment.

3. A trustee for the sale of lands becomes the purchaser himself. His *cestui que trust* on learning the fact files a bill to have the sale declared void; the trustee alleges that he paid the full value of the lands. Is this a good defence to the suit? Give reasons.

4. One of several sureties is obliged to pay the debt to the creditor. What are his rights as regards (a) the creditor, (b) the principal debtor, and (c) his co-sureties, respectively? State fully.

5. Enumerate and explain the cases in which equity will enforce specific performance of a parol agreement for the sale of lands, notwithstanding the provisions of the Statute of Frauds.

6. Upon what grounds does equity interfere to restrain actions at law, and how does it justify this apparent interference with the process of other Courts?

7. Give the rules with regard to the obligation of a purchaser to see to the application of the purchase money, 1st, irrespective of statutory enactments; 2nd, having regard to statutory enactment.

8. Is there any difference, and, if so, what, in the liability of one of the several trustees, and one of several executors for moneys, which are not received by him, but by his co-trustees or co-executors, but for which he joins in giving a receipt? Explain fully.

9. If a defendant desires production of documents by the plaintiff, how can he obtain it? 1st. Where the plaintiff is an individual? 2nd. Where the plaintiff is a corporation?

10. In what cases, and how, can a certificate of *lis pendens* be obtained? What is its effect, and what must be done in order to render it effectual?

## CALL TO THE BAR.

*Byles on Bills—Stephen on Pleading—Common Law Pleading and Practice.*

1. What are "letters of credit" and "cir-

## CORRESPONDENCE.

cular notes," and what is the legal effect of the issue of such.

2. State accurately the circumstances under which the vitiation by fraud of the consideration for a bill will be a defence to an action on a bill.

3. A bill is endorsed conditionally so as to impose on the drawee, who afterwards accepts, a liability to pay the bill to the endorsee or his transferees in a particular event only. The bill is passed through several hands between endorsement and acceptance, and is finally paid by the acceptor before the condition is satisfied. How will this affect the liability of the acceptor to the payee?

4. What is the effect of a material alteration of a bill by an endorsee (a) on his rights against prior parties on the bill, (b) on his rights against his endorser, (c) on the rights of a subsequent *bona fide* transferee for value?

5. Sketch briefly the history of the action of ejectment tracing it from its original to its present form.

6. In cases tried at *Nisi Prius*, with a jury, where the Judge either does not wish or is not required by the parties, to give his opinion on points of law raised at the trial, what are the different courses referred to by Mr. Stephen, which may be pursued for determining such questions of law? Give any recent statutory enactments tending to facilitate such cases.

7. How should an estoppel be set up (a) when it appears on the face of the adverse pleading; (b) when it does not so appear? Answer fully.

8. "It is not necessary to state matter of which the Court takes notice *ex officio*." Explain and illustrate this rule.

9. What right of peremptory challenge of jurors have parties in a civil action? Give authority for your answer.

10. State briefly the practice in relation to the examination of parties to Common Law actions before trial. What provision is there as to the use in evidence of depositions so taken?

Best on Evidence—Smith on Contracts.

1. Explain, after Mr. Best, the expression "evidence is either *ab intra* or *ab extra*."

2. State and explain the three "guarantees" or "sanctions" of truth among men in their intercourse with each other as referred to by Mr. Best.

3. What difference is there as to the effect of evidence (a) in civil, (b) in criminal proceedings?

4. Amongst the "infirmative hypothesis" affecting real evidence, Mr. Best mentions "*forgery of real evidence*." Explain the meaning of this, and shew the causes in which such forgery may have its origin as stated in the text book.

5. State the circumstances under which "*dying declarations*" are admissible in evidence.

6. Distinguish between a *patent* and a *latent* ambiguity, giving examples of each. What is the rule as to the explanation of each by verbal evidence?

7. A owes B \$50. C for a consideration paid, promises A verbally that he will pay the debt. Can this promise be enforced? If so, why? if not, why not?

8. A who has no interest in the life of B, furnishes him with money to insure his life upon the understanding that A shall have the benefit of the assurance, and a policy is obtained accordingly. Give reasons for and against the validity of such policy.

9. Two persons agree to fight for a wager, and deposit the amount in the hands of a stakeholder. Discuss the question whether the money can be recovered back from the stakeholder.

10. What difference is there between the power of (a) a general agent and (b) a particular agent to bind the principal?

## CORRESPONDENCE.

Chief Justice Osgoode.

To the Editor of CANADA LAW JOURNAL.

SIR,—In the work of the Rev. Dr. Scadding, lately published, there is a steel engraving of the late Hon. William Osgoode, first Chief Justice of Upper Canada.

I think it would be very much desired by the profession generally, if an oil painting were prepared from the illustration, and hung at Osgoode Hall with the other portraits there.

By allowing this suggestion to appear in your journal, I have no doubt the Benchers would see to its being carried into effect.

LEX.

[In November, 1876, we suggested that the series of portraits in Osgoode

## LAW SOCIETY, TRINITY TERM.

Hall, should be perfected by obtaining those of Osgoode, Powell, Scott, and Campbell. We are not aware whether any steps have been taken to supply the deficiency. It should be done at once, for as time goes on the difficulty of obtaining reliable portraits of these old workers necessarily increases.—ED. L. J.]

*FLOTSAM AND JETSAM.*

The Chicago Bar Association has undertaken the somewhat difficult but very necessary work of removing from the ranks of the profession in Chicago all disreputable practitioners. It has accomplished something, for it has caused the disbarment of

one who procured his license to practice by fraud, and has presented to the court for disbarment an advertising divorce lawyer. In reference to this individual the court has not rendered its decision, but he now repudiates the idea of being in the divorce business, so that if he escapes with his license it will not be a triumph for the divorce fraternity. We hope the association will keep at its good work.—*Albany L. J.*

A comical instance of a man playing upon his own name sprang out of absent-mindedness. Sir Thomas Strange, calling at a friend's house, was desired to leave his name. "Why," said he, "to tell the truth I have forgotten it." "That's strange, sir!" exclaimed the servant. "So it is, my man. You've hit it," replied the judge, as he walked away, leaving the servant as ignorant as before.

**Law Society of Upper Canada.**

OSGOODE HALL,

TRINITY TERM, 42ND VICTORIAE.

During this Term, the following gentlemen were called to the Bar; namely:—

HENRY PIGOTT SHEPPARD.  
ISAAC CAMPBELL.  
A. BRISTOL AYLSWORTH.  
RICHARD DULMAGE.  
HARRY THATCHER BECK.  
MATTHEW WILSON.  
WILLIAM HENRY FERGUSON.  
WILLIAM E. HIGGINS.  
JAMES CARRUTHERS HEGLER.  
FREDERICK WILLIAM PATTERSON.  
EUGENE LEWIS CHAMBERLAIN.  
MAXFIELD SHEPPARD.  
NEIL A. RAY.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely:—

*Graduates.*

WILLIAM RIDDELL.  
DAVID PHILIP CLAPP.

ADAM JOHNSTON.  
GEORGE GORDON MILLS.  
GEORGE WILLIAM BEYNON.  
JOHN HENRY MAYNE CAMPBELL.  
CHARLES MILLAR.  
THOMAS ALFRED O'ROURKE.  
EDWARD ROBERT CHAMBERLAIN PROCTOR.  
CONRAD BITZER.  
JOHN RUSSELL.  
JOHN WILLIAM RUSSELL.

*Matriculants.*

W. J. TAYLOR.  
HARRY THORPE CANNIFF.  
THOMAS PARKER.  
A. DOUGLAS PONTON.  
ALBERT EDWARD DIXON.

## And as an Articled Clerk—

EUDO SAUNDERS.

*Junior Class.*

J. L. MURPHY.  
A. G. CLARKE.  
W. B. DICKSON.  
W. G. WALLACE.  
T. K. PORTEOUS.  
D. H. TENNENT.  
M. S. MCCRANNEY.  
J. TELFORD.  
C. H. CLEMENTI.  
W. HAWKE.  
J. B. PATTERSON.  
J. W. HANNA.  
C. H. CLINE.  
G. W. DANKS.  
C. A. HESSON.  
R. E. HARDING.  
C. HENDERSON.  
J. CAMPBELL.  
J. G. CHEYNE.  
F. E. BERTRAND.  
T. MOFFAT.  
S. O. RICHARDS.

*Articled Clerks.*

A. F. GODFREY and  
HUGH McMILLAN, as of Easter Term.

## LAW SOCIETY, TRINITY TERM.

PRIMARY EXAMINATIONS FOR  
STUDENTS-AT-LAW AND ARTICLED  
CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

## CLASSICS.

Xenophon, *Anabasis*, B. I.; Homer, *Iliad*, B. I.; Cicero, for the Manilian Law; Ovid, *Fasti*, B. I., vv. 1-300; Virgil, *Æneid*, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

## ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. Musæus, *Stumme Liebe*. Schiller, *Lied von der Glocke*.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students-

at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or,

Virgil, *Æneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

After Hilary Term, 1879, the Matriculation Examination will be as follows:—

## SUBJECTS OF EXAMINATION.

*Junior Matriculation.*

## CLASSICS.

- |      |  |
|------|--|
| 1879 | { Xenophon, <i>Anabasis</i> , B. II.               |
|      | { Homer, <i>Iliad</i> , B. VI.                     |
| 1879 | { Cæsar, <i>Bellum Britannicum</i> .               |
|      | { Cicero, <i>Pro Archia</i> .                      |
|      | { Virgil, <i>Eclog.</i> I., IV., VI., VII., IX.    |
|      | { Ovid, <i>Fasti</i> , B. I., vv. 1-300.           |
| 1880 | { Xenophon, <i>Anabasis</i> , B. II.               |
|      | { Homer, <i>Iliad</i> , B. IV.                     |
| 1880 | { Cicero, in <i>Catilinam</i> , II., III., and IV. |
|      | { Virgil, <i>Eclog.</i> I., IV., VI., VII., IX.    |
|      | { Ovid, <i>Fasti</i> , B. I., vv. 1-300.           |
| 1881 | { Xenophon, <i>Anabasis</i> , B. V.                |
|      | { Homer, <i>Iliad</i> , B. IV.                     |
| 1881 | { Cicero, in <i>Catilinam</i> , II., III., and IV. |
|      | { Ovid, <i>Fasti</i> , B. I., vv. 1-300.           |
|      | { Virgil, <i>Æneid</i> , B. I., vv. 1-304.         |

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.



## LAW SOCIETY, TRINITY TERM.

## ENGLISH.

A paper on English Grammar.  
Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and  
The Traveller.

1881.—Lady of the Lake, with special refer-  
ence to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History from William III. to George  
III., inclusive. Roman History, from the com-  
mencement of the Second Punic War to the death  
of Augustus. Greek History, from the Persian  
to the Peloponnesian Wars, both inclusive.  
Ancient Geography: Greece, Italy, and Asia  
Minor. Modern Geography: North America  
and Europe.

## Optional Subjects.

## FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 } Souvestre, Un philosophe sous les toits.  
and }  
1880 }

1879 } Emile de Bonnechese, Lazare Hoche.  
and }  
1881 }

## GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 } Schiller, Die Bürgschaft, der Taucher.  
and }  
1880 }

1879 } Schiller { Der Gang nach dem Eisen-  
and } hammer.  
1881 } Die Kraniche des Ibycus.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Inter-  
mediate Examination shall be :—Real Property,  
Williams; Equity, Smith's Manual; Common  
Law, Smith's Manual; Act respecting the Court  
of Chancery (C. S. U. C. c. 12), C. S. U. C. caps.  
42 and 44, and Amending Acts.

The Subjects and Books for the Second Inter-  
mediate Examination shall be as follows :—Real  
Property, Leith's Blackstone, Greenwood on the  
Practice of Conveyancing (chapters on Agree-  
ments, Sales, Purchases, Leases, Mortgages, and  
Wills); Equity, Snell's Treatise; Common Law,  
Broom's Common Law, C. S. U. C. c. 88, and

Ontario Act 38 Vic. c. 16, Statutes of Canada,  
29 Vic. c. 28, Administration of Justice Act  
1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Intro-  
duction and the Rights of Persons, Smith on Con-  
tracts, Walkem on Wills, Taylor's Equity Juris-  
prudence, Stephen on Pleading, Lewis's Equity  
Pleading, Dart on Vendors and Purchasers,  
Best on Evidence, Byles on Bills, the Statute  
Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the  
preceding :—Russell on Crimes, Broom's Legal  
Maxims, Lindley on Partnership, Fisher on Mor-  
gages, Benjamin on Sales, Hawkins on Wills,  
Von Savigny's Private International Law (Guth-  
rie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's  
Mercantile Law, Taylor's Equity Jurisprudence,  
Smith on Contracts, the Statute Law, the Plead-  
ings and Practice of the Courts.

Candidates for the Final Examinations are  
subject to re-examination on the subjects of the  
Intermediate Examinations. All other requisites  
for obtaining Certificates of Fitness and for Call  
are continued.

## SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I.  
Stephen on Pleading, Williams on Personal  
Property, Hayne's Outline of Equity, C. S. U. C.  
c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. — Williams on Real Property, Best  
on Evidence, Smith on Contracts, Snell's Treatise  
on Equity, the Registry Acts.

3rd Year. — Real Property Statutes relating to  
Ontario, Stephen's Blackstone, Book V., Byles  
on Bills, Broom's Legal Maxims, Taylor's Equity  
Jurisprudence, Fisher on Mortgages, Vol. I. and  
chaps. 10, 11, and 12 of Vol. II.

4th Year. — Smith's Real and Personal Property,  
Harris's Criminal Law, Common Law Pleading  
and Practice, Benjamin on Sales, Dart on Ven-  
dors and Purchasers, Lewis's Equity Pleadings  
Equity Pleading and Practice in this Province.

## DIARY—CONTENTS—EDITORIAL NOTES.

## DIARY FOR DECEMBER.

2. Mon. ..Last day for delivering appeal books.
3. Tues. ..County Court and General Sessions for York begin.
4. Wed. ..Armour, J., sworn in as Judge of the Court of Q.B., 1877.
5. Thurs. ..Rehearing term in Chancery begins.
6. Fri. ....Law Society Convocation meets.
7. Sat. ....Michaelmas Term ends. Rebels defeated at Toronto, 1837.
10. Tues. ..County Court Sittings, except York, begin.
11. Wed. ..Blake, V. C., sworn in, 1872.
15. Sun. ..Morrison, J., sworn in as a Judge of the Court of Appeal, 1877.
16. Mon. ..Sittings of Court of Appeal.
17. Tues. ..First Lower Canada Parliament met, 1792.
24. Tues. ..Christmas vacation begins.
25. Wed. ..Christmas Day.
28. Thurs. ..Upper Canada made a Province, 1791.
27. Fri. ....Spragge, C., appointed Chancellor, 1869.
30. Mon. ....Nomination of candidates for Municipal offices.
31. Thurs. ..Law Society Convocation meets.

## CONTENTS.

## EDITORIALS :

## PAGE

Reduction of Attorneys' fees.....	307
Legal business in England .....	307
Cheap conveyancers .....	308
Wandering through Osgoode Hall .....	308
The late Chief Justice Harrison.....	308
Recent Judicial Changes .....	307, 310
Division Court Jurisdiction .....	312
Osgoode Hall and Toronto of Old.....	317

## SELECTIONS :

Use and abuse of Legal Holidays .....	319
Judicial Emoluments .....	320

## NOTES OF CASES :

Chancery .....	311
----------------	-----

## CANADA REPORTS ;

## ONTARIO—

South Grenville Election Case .....	322
Recount of Ballots by County Judge—	
Marked Ballots—Identification of	
Voter.	

## ENGLISH REPORTS :

Digest of the English Law Reports for May,	
June and July, 1878 .....	323

## LAW STUDENTS' DEPARTMENT :

Examination Papers .....	330
--------------------------	-----

## BOOK REVIEWS .....

## CORRESPONDENCE .....

## BOOKS RECEIVED.....

## LAW SOCIETY OF UPPER CANADA .....

## Canada Law Journal.

*Toronto, December, 1878.*

The Benchers, finding a sufficient surplus in the coffers of the Society, have decided to reduce the fees payable by Attorneys on taking out their annual certificates. The fees will, therefore, until further notice, be fifteen dollars, with the usual Barrister's fee of two dollars in addition. If anything has been paid, during the Term, anything in excess of the present fee, it will be refunded on application.

The legal journals in England complain that the universal stagnation of commerce has largely affected the profession, and that new work is very limited. In the Chancery Division the list of causes for hearing this Michaelmas, contains 412 cases, being nearly 200 less than there were at a corresponding period a year ago. Even divorce business has fallen off, and it is suggested that there is in fact less cruelty and adultery than when money was plentiful; this is certainly an exemplification of the old saying, "it is an ill wind that blows nobody good."

Several judicial appointments were made recently in the Province of Quebec. Hon. J. T. Taschereau, having resigned his seat on the Supreme Court Bench, has been succeeded by Hon. H. E. Taschereau, formerly one of the judges of the Superior Court of Lower Canada. Some time since we called attention to the fact that the former had never complied with the terms of the Supreme Court Act by living at Ottawa. Mr. H. T. Taschereau, of Quebec, has been made a puisne judge of the Superior Court for Lower Canada, in the room of Mr. H. E. Taschereau. Hon. Maurice

## EDITORIAL NOTES—THE LATE CHIEF-JUSTICE HARRISON.

Laframboise, of Montreal, has been appointed to a similar position in the District of Gaspé. In Ontario, Mr. Archibald Bell takes the place of Mr. Wells, as Judge of the County Court of the County of Kent. In Nova Scotia, Mr. R. N. Weatherbee has been appointed one of the judges of the Supreme Court of that Province *vice* Hon. J. M. Wilkins, resigned.

The Barrister who publishes the following advertisement ought to be encouraged. He is certainly *cheap*—we are not able to say, except from the card, whether he is the rest of it. He seems to suggest that if “advised” he may increase his charges. We humbly advise him to do so at once. He probably rates his own work at its proper comparative value, at least he ought to know most about it, but the difficulty is that most respectable clients will take him at his own valuation, and go to some one who is not *cheap* and—the other thing that generally goes with cheapness.

## “A CARD.

“I beg to inform the public that till otherwise advised I will reduce the charge for Conveyancing to the following prices :—

- “Drawing, Simple Deeds, including Affidavit of Execution - - \$1.50
- “Drawing Simple Mortgage, including Affidavit of Execution - \$2.00
- “Discharge of Mortgage - - - \$0.50

“*Barrister, Leamington.*

“N.B.—Parties wishing to borrow money will find it to their advantage to give me a call as I am prepared to obtain loans at a low rate of interest, and on favourable terms.”

A stranger who might happen to wander into Osgoode Hall about mid-

day towards the end of last month, would conceive an exalted idea of the amount of law that is administered to the people of this Province. Facing the entrance he would find Common Law Chambers just winding up for the day. If he ventured through the labyrinth of passages, and put on his great-coat to go across the *un*-covered way (the height of stupidity, inconvenience and absurdity by the way, is that same chaos, one cannot call it arrangement of new offices, &c.) he would, if he did not lose himself, find the Master's office in full blast. He might then stumble up a back stairs and blunder into the wrong end of the Court of Appeal, and *not* be scowled at by that august body, for it is a most courteous Court; not the least so, by the way, in Osgoode Hall. On either side of the Hall he would find the Queen's Bench and Common Pleas hard at work. Passing then through the beautiful library, full of busy “limbs” and thoughtful dons, he would find one of the Vice-Chancellors holding Court in one room, and the Chancellor in another; with the Referee holding Chancery Chambers in yet another—fifteen Judges and judicial officers dispensing justice, which has been ground up for them by numerous officials, assisted by a perfect army of attorneys, solicitors, articulated clerks and students. The stranger, as he left the precincts of Osgoode Hall, would probably remark that he had seen “more law to the acre” than he had ever seen before.

## THE LATE CHIEF-JUSTICE HARRISON.

Upon the appointment of Robert Alexander Harrison, Q.C., as Chief Justice of Ontario in September, 1875, we took occasion to publish\* a biographical sketch of

## THE LATE CHIEF JUSTICE HARRISON.

that much lamented gentleman. It is only three short years since he attained the summit of his ambition; there is therefore but little now to speak of except shortly to refer to his career on the Bench, and to deplore his loss. When he took his seat as Chief Justice of Queen's Bench there was a large amount of business in arrear. With his usual energy and amazing industry, and a capacity and apparent love for work never excelled, and hardly equalled in this country, and with that able and excellent Judge, the present Chief Justice of the Common Pleas by his side, he grappled with the task before him, and in an incredibly short space of time conquered it. From that time until his last illness, the business of the Court was in a most satisfactory condition, with nothing behindhand and everything in order. During the period between his appointment and his death, there were published no less than six and a half volumes of Reports, whilst in the three years preceding there had only appeared four and a half volumes. The amount of work this represents is enormous.

In addition to his ordinary judicial business, he was, shortly after his elevation to the Bench, appointed one of the arbitrators on the question of the boundary between the Province of Ontario and the North-West Territories. This was a most laborious undertaking, entailing a vast amount of research and careful consideration, but he rapidly mastered the subject, and its satisfactory adjustment was the speedy result.

As a counsel, so as a judge, Mr. Harrison won the confidence of the Bar, by his uniform good temper, patience, and untiring devotion to his duties. His research was great, and if he relied, as possibly he did, too much on cases for his law, there was a satisfaction in knowing that nothing that bore on the subject

had been lost sight of. Although, to a great extent in the habit of looking at points before him for adjudication through the spectacles of "case law" his strong common sense and his inborn perception of the springs of thought and action of the masses, perfected by an enormous experience at the Bar, prevented him from falling into the mistakes to which a mere case lawyer is so subject.

Some of his best judgments were in municipal cases, a branch of the law with which he was confessedly more familiar than any man at the Bar. Probably the most important case which came before him was *Regina v. Wilkinson*. The Chief Justice there characterised, as it deserved, the "reckless and intemperate" attack by a public journal on one of the Judges of the Court in a judgment befitting the occupant of such an honourable position, and calculated to uphold the dignity and authority of a Court which had been assailed, not merely by the article complained, but by the language used in the face of the Court itself by the journalist in support of his previous attack. Whilst in this latter respect some thought that too great a latitude had been allowed the offender, and others regretted that in such an important matter the Court should have been divided, the judgment of the Chief Justice stands as a vigorous protest against the license of the press, when trenching upon the independence of the Bench, the palladium of the public liberty.

In the case of *Pringle v. The Corporation of Napanee*, Chief Justice Harrison did not fail to decide, in an exhaustive judgment, most carefully prepared, the noble doctrine that Christianity is a part of the recognised law of this Province, as it is also of the great Empire that encircles the globe, thereby laying a

## RECENT JUDICIAL CHANGES.

stone in the fabric of our Dominion, without which the edifice must be a failure, and thus publicly stating the law to be in accordance with the belief that he privately held. In the peace of this belief passed away one who will ever be affectionately remembered by his brethren—a memory which will be an encouragement to all who desire to attain to eminence by honest industry and unswerving integrity.

## RECENT JUDICIAL CHANGES.

The vacancy caused by the death of Chief Justice Harrison has caused a recasting of the *personel* of the two Common Law Courts.

The Chief Justice of the Common Pleas takes the position of Chief in the senior Court. Mr. Justice Wilson leaves the latter Court and takes the seat vacated by Chief Justice Hagarty, whilst Hon. Matthew Crooks Cameron becomes the Junior Puisne Judge of the Queen's Bench. We are glad to be able to say that these appointments have, one and all, been received by the profession and the public with unqualified approval.

Of the present learned Chief Justice of the Queen's Bench, it is not necessary to speak at any length. His position is practically the same as before, though it may be esteemed more honourable, as being in the senior Court, and that apart from any question as to the constitutionality of the legislation which deprived its presiding Judge of the appellation of Chief Justice of Ontario.

In February, 1856, Mr. Hagarty was sworn in as a Judge of the Court of Common Pleas, in the place of Mr. McLean, who was appointed to the Queen's Bench, when Mr. Draper left that Court to become Chief Justice of the Common Pleas, which seat was vacated by the resignation of Mr. Macaulay. In Hilary vaca-

tion, 1862, Mr. Hagarty was taken from the latter Court and transferred to the Queen's Bench, again taking the vacant seat of Mr. McLean, who was made Chief Justice of Upper Canada, in the room of Sir John B. Robinson, who was appointed President of the Court of Error and Appeal. On the first day of Michaelmas Term, 1868, Mr. Hagarty became Chief Justice of the Common Pleas, in the place of the present Chief Justice of the Supreme Court, who was then made Chief Justice of Ontario, in the room of Mr. Draper, appointed President of the Court of Error and Appeal. Originally placed on the Bench for his merits alone, without regard to politics, his brilliant talents and great learning are too well known to need comment on our part. whilst in private life no more kindly, hospitable gentleman of the old school has been the centre of an admiring circle of friends. Mr. Hagarty was born in Dublin, in 1816, and came to this country in 1824. He was admitted in Trinity Term, 1835, and called to the Bar in Michaelmas Term five years later. He was made a Bencher of the Law Society in the same Term, in the year 1855.

The new Chief Justice of the Common Pleas, Hon. Adam Wilson, who is about 64 years of age, came to this country from Scotland in 1830, and resided for a few years in the Township of Trafalgar, with an uncle in business there. In January, 1834, he was articled to the law in the office of Baldwin & Sullivan. He was there a diligent student, and being called to the Bar in Trinity Term, 1839, remained in the management of the office for Hon. Robert Baldwin, until he went into partnership with that eminent man in January, 1840. This partnership continued until 1849, when it was dissolved, Mr. Baldwin retiring from the practice of the profession. The next year Mr. Wilson formed a partnership with Dr. Larratt

## RECENT JUDICIAL CHANGES.

W. Smith, and subsequently with Mr. Hector, which continued until 1856, when he retired from general practice and applied himself to Counsel business only. Mr. Wilson, though his clients were many, found time for public affairs and took a lively interest in the politics of the day, being allied with that party that was led by first partner and friend Mr. Baldwin. In 1859 and 1860, he sat as Mayor of the City of Toronto, having been elected by general vote. Not content with Municipal honours, he entered into the larger field of Canadian politics, and, in 1859, was elected as member for the North Riding of York in the Parliament of Old Canada. He represented that constituency until his appointment to the Bench in 1863. During part of this period, he held the office of Solicitor-General and Executive Councillor. Appointed in the first place to the Court of Queen's Bench, he only remained there a few months, when he went to the Common Pleas, changing places with Mr. Morrison. He afterwards went back to the Queen's Bench along with Mr. Richards, at the time when Mr. Hagarty became the Chief Justice of the Common Pleas. He has now, therefore, for the second time, taken his seat in the latter Court. Always regarded as a sound and able lawyer, painstaking and industrious to a degree, most fearless and conscientious in his discharge of his judicial duties, he is, in addition, distinguished for his never failing courtesy to the Bar and to the students, even under circumstances that are occasionally calculated to upset the equanimity even of the most patient Judge. All who appear before him may be sure of a patient hearing and undivided attention, and a certainty that their arguments, however trivial they may seem, will receive due and careful consideration. We

trust he may live long to enjoy the position he has attained.

When we turn to the new Judge that has recently taken his seat in the Queen's Bench, we feel indeed that a blank has been created at the Bar which none can fill. How many will feel "lost" when they cannot secure the able, eloquent and courageous advocate, who made his client's cause his own, whose last thought was of failure, and whose cheery encouragement, if it did not actually win the case or acquit his client, made defeat less painful. Few public men have gained the respect alike of friend and foe to the same extent as Matthew Crooks Cameron. A Conservative in politics, he fought well for his party, but never condescended to take any mean or unfair advantage, for far above his loyalty to his party was his love for his country, and his love of right and justice. He has been in public life since 1861, first sitting for North Ontario in the Parliament of Old Canada. After Confederation he became one of the colleagues of Hon. J. S. Macdonald, in the first Legislative Assembly of Ontario, represented East Toronto from that time until the present. Whilst we grieve that such an able advocate is lost to the Bar, we congratulate the public that one of the truest of men has been found for the Bench. Always very popular at the Bar, and deservedly so from his great ability and his pleasant address and straightforward character, he was especially sought after at *Nisi Prius*, and he has had for many years past a larger practice in criminal cases than any of his brethren.

Mr. Cameron was born at the Town of Dundas, on the 2nd of October, 1822. At the age of twenty he commenced the study of the law in the office of Gamble and Boulton, and in February, 1849, he was called to the Bar on the same day as

## DIVISION COURT JURISDICTION.

his late partner, Dr. McMichael. He received his silk on the 27th of March, 1863, but declined to become a Bencher of the Law Society until the election was thrown open to the profession. Mr. Cameron was sworn in as a Judge of the Queen's Bench, on the 27th of November, 1878.

### DIVISION COURT JURISDICTION.

Pressure has been brought to bear upon the Attorney-General in favour of an increase in the jurisdiction of Division Courts, and he has sent circulars to the Judges, and to many in the profession, and others, asking their opinion on various points. It can be stated without fear of contradiction, that the sentiment of the profession, so far as that is concerned, is unanimously and strongly against a change. A resolution adopted at Peterborough, by the Bar in that neighbourhood, and the answer of the Kingston Bar to the circular of the Attorney-General, which we make room for, are some of the evidences we might adduce in proof of this. The letter from the Kingston Bar sets forth a formidable indictment against some of the abuses of the Division Court system, and contains many powerful arguments against doing that which, in the opinion of all thoughtful men, must be most injurious to a procedure admirably adapted in its simplicity to the end originally intended by its founders. We venture to assert, also, that not half-a-dozen Judges, either of the Superior Courts or County Courts are in favour of a change.

Only two classes could possibly benefit by an increase, and these are either (1) the "poor debtors" or (2) Division Court officers. As to the first, it is too absurd to suppose that any one is agitating for a change in the expectation that he may get into debt and may

be sued and, if so, would have to pay a trifle less in the way of costs.

As to the second class we have so much sympathy with that intelligent and sometimes badly paid body of men, Division Court clerks, that we regret to have to say anything which might be construed into a desire to militate against their supposed interests. There is, however, a view of the matter which may not have occurred to them. The value of these Courts is not that they cheapen law in the abstract, but that they are essentially Courts for the poor man. To increase their jurisdiction would mar their usefulness, spoil their character and destroy their equilibrium. It would throw into them a number of important cases which would gorge the present simple machinery, and so largely increase the emoluments of some of the officers, as to cause an outcry against the whole body, which would seriously react to their disadvantage. It is only a short time since one of the most intelligent mercantile men in the country, and a prominent member of the Board of Trade, publicly expressed his opinion that there should be no legal process for collecting any debt under \$100, and there are many who take the same view. Whilst we are not prepared to go this length, the final result of a movement which has its origin in anything but the general wish of the community may very possibly be to apply the lancet to the extent of doing away with all suits for debt under, say, \$50.

The letter from the Kingston Bar would seem to suggest something like antagonism between professional men and Division Court officers. We hardly think that this is the case to any great extent, except perhaps in certain localities. On the whole, they get on reasonably well together, and we should be sorry to see hostility evoked between them. Professional men, however, cannot be expected

## DIVISION COURT JURISDICTION.

to stand idly looking on while the administration of the law in one of its branches is being tampered with to the public injury.

We almost fancy we can trace in the inception of this movement the hands of some of those "agents" who are, as we think, unhappily allowed to dabble in matters of which they are profoundly ignorant, and for which they have undergone no apprenticeship. Unlike the heavily taxed lawyer, these persons pay no fees; and, as a general rule, and to the extent of their ability, bring discredit upon the administration of justice in the Courts where they are found. We shall not insult the Attorney-General by supposing that he would pay the slightest attention to pressure inaugurated by this class.

No—it would be well on every ground to let well alone. Those who are stimulating this movement would find, if they should be so unfortunate as to succeed, that they had acted in a suicidal manner. And, on the other hand, the Attorney-General will, we trust, see that the desire for a change comes from interested sources, to which he cannot safely or conscientiously give way. The country would possibly welcome a comprehensive, well-considered scheme for the fusion of law and equity, but the people are sick of this everlasting tinkering of statutes at the instance of men who are ignorant and careless of the mischief they may do.

This subject is of such a nature, and is so important to the due administration of justice, to say nothing of the interests of the profession, which of course is a minor consideration, as to challenge the notice of the Law Society. We have not heard of any action being taken in the matter, but certainly if Local Bar Associations take it up, *a fortiori*, the central body cannot, with any regard to the position to which they have been

elected by their brethren, ignore it. We commend it to their immediate notice, to be dealt with as they may deem right in the premises.

At a meeting of the Local Law Society of Peterborough, an association to which almost all the members of the profession in that neighbourhood belong, the resolutions, of which a copy is given below, were unanimously passed, and a copy of them sent to the Attorney-General. These resolutions were in reply to the circular which the Attorney-General has sent to various members of the profession, asking them to answer the questions therein, relating to the proposed increase in the jurisdiction of the Division Courts :

"Moved by Mr. Dumble, seconded by Mr. Dennistoun, Q.C., and *resolved*.

In the opinion of the members of the legal profession of Peterborough, there should not be any increase in the jurisdiction of the Division Courts, for the following amongst other reasons :—

1. The machinery of the County Courts is better.

2. The officers of the County Court are, as a rule, men of higher training and capacity for the discharge of official business than those of the Division Courts.

3. The proceedings in the County Court are always on file or record at the Judge's Chambers, and are more accessible when required, and are more safely preserved than those of the Division Courts, which are kept at the several offices of the clerks.

4. Judgments can more expeditiously be obtained in County Courts—as on default or where defences for time are put in.

5. There is no remedy against land in the Division Court, and to transfer judgments to the County Court is no advantage over proceedings in that Court in the first instance, and in other particulars the remedies in the County Court are more effective.

6. The Sheriff is a better executive officer than the Bailiff, and is controlled by better machinery than the Bailiff.



## DIVISION COURT JURISDICTION.

7. The costs in the Division Court are in proportion to the amounts recovered, larger than in the County Court.

8. The increase of the jurisdiction of the Division Court would practically be merely a transfer of County Court cases to a Court of inferior machinery with many disadvantages, and no appreciable benefit. The increased jurisdiction necessitating more careful investigations would so lengthen the sittings of that Court as to impose increased expense on suitors, and thus assimilate that Court to the present County Court.

There should not be a counsel fee taxed against the losing party, as this would render the Court no longer the "Poor Man's Court;" moreover such a provision would increase litigation. This opinion is expressed in respect of the Court as it now stands.

We are of opinion that the mercantile community are not so satisfied with the Division Courts that they would like to see the jurisdiction increased. In cases of importance the client is compelled to employ a solicitor to urge the execution of the process of the Court, and in that event he would prefer getting the benefit of the machinery and services of the officers of the higher Court."

The following is the answer of the Kingston Bar to the circular of the Attorney-General :

"The members of the Kingston Bar, having met to consider the several points proposed in your circular respecting the Division Courts of this Province, would respectfully submit the following as their strong and unanimous opinion on the several questions submitted.

1. As to the expediency of an increase being made in their jurisdiction.

We most decidedly think that any increase in the jurisdiction of the said Courts would be inexpedient, and would advise, on the contrary, that their jurisdiction be reduced and limited to claims, both in contract and tort, not exceeding the sum of \$40. Should this be done, and claims above \$40 transferred to the County Court, we would suggest that an inferior scale of costs be framed for actions in that Court in which

the amount recovered is below the sum of \$100.

These views are forced upon us by considerations, some of which may be briefly stated.

Justice and truth are much less effectually secured by allowing suits to come to trial without any preliminary system of pleading, such as exists in all other Courts. By such a system of pleading, the real points in issue between the parties are evolved from the controversy; without it, the parties come to trial in the dark, are frequently surprised by unexpected matters of dispute or grounds of defence, or subpoena unnecessary witnesses at additional cost and inconvenience to prove facts never denied.

The power to examine the parties to a suit before trial and to obtain discovery of documents is in the highest degree advantageous, and has been wisely extended to the Courts of Common Law, where it gives the greatest satisfaction. No such power exists in the Division Court, nor could it be successfully introduced while parties conduct their own cases. The inquiry could not be confined within proper and legal limits by persons unacquainted with law, and would become disorderly, ill-tempered, and degrading to the dignity that should characterize the administration of justice.

The law administered by the several judges in the different Division Courts is frequently so uncertain, diverse, and fickle that it is impossible to decide one's rights or liabilities without actual suit, or to advise clients with any confidence on matters within its jurisdiction. The power of the judge to decide according to law, equity or good conscience has been held, in *Siddall v. Gibson et al.*, 17 Q. B., to enable him to dispose of cases within his jurisdiction according to his own ideas of law and good conscience, whether his ideas are right or wrong, and from such decision there is no appeal. This destroys the safeguard of law, and makes the judge an irresponsible arbiter, and a man's rights to depend on the habit of mind, state of temper, caprice or indigestion of the judge who may chance to try the case. The words of Chief Jus-

## DIVISION COURT JURISDICTION.

tice Robinson in *Doe dem. Anderson v. Todd*, 2 Q. B., are much in point. "That 'misera servitus' which is said to exist where 'jus est vagum' is so justly dreaded in these times that no one can consent to admit that there exists in any tribunal an arbitrary discretion." In trivial matters the principle might be tolerated, but in questions of any importance it is unwise and unjust.

The limit of \$40 is suggested as a reasonable one, and because no judgment for a less amount is a charge on lands. Any judgment over that should be a matter of record, and the issues should appear by documentary evidence. The expense, too, of proceeding to judgment directly in the County Court, under an inferior scale of fees, would not be much, if any, in excess of the indirect method of suit to judgment in the Division Court and removal by transcript to the County Court, as in nearly all contested cases in the Division Court of over \$40, legal advice is taken and counsel is employed, whose charges are paid by the party employing him and are regulated by no tariff. It would be much fairer that the fees of lawyers employed should be subject to taxation with the costs of the cause and should fall upon the unsuccessful party. The fact that the opposite party will probably employ a lawyer, and be put to expense he will have himself to pay, frequently leads to groundless suits and obstructive defences. It seems but right that the unsuccessful party should pay all the costs incurred through his default, and that a suitor for a sum of \$40 should be at liberty to entrust the conducting of his case to one skilled in the law, whose fees should form a part of the costs incident to the litigation. The penalty of costs, too, is the only check on speculative or vindictive suits. A direct suit in the County Court would prevent such difficulties as those in *Burgess v. Tully*, 24 C.P.

The absence from the Division Courts of these badges and insignia, thought important in the other Courts from their effect upon the popular mind, and the conducting of cases by laymen with an excess of zeal, but without knowledge, and often

gentlemanly instincts, or by the litigants themselves, to whom even greater license is allowed, destroy the gravity and solemnity all important to the investigation of truth, and introduce instead a feeling of colloquial contention and disputation, a want of restraint and respect, the presence of a judge is not sufficient to preserve, and a recklessness of statement and assertion incident to a common altercation. It is notorious among those who practise in Division Courts that they have a bad pre-eminence for hard and unreliable swearing. A local paper styles them "sink holes of iniquity." Although the rule of law is relaxed which forbade a counsel being also a witness, the indecency of the thing still continues.

The excessive charges made by clerks and bailiffs, who virtually fix their own remuneration, has been pointed out so forcibly by the Inspector of these Courts, that it is only necessary to add that experience fully corroborates his statement. There is, however, but one effective check, and that is the employment of attorneys to conduct suits, and the taxation of all costs by them before the Clerk of the Court as in County and Superior Courts.

Perhaps the greatest and most general ground of complaint among suitors is the delay in getting money made under process of the Court, and the large proportion of cases sued in which nothing is ever realized. Persons who have much experience in the Courts frequently remark that they might as well forgive the debt as sue for it in the Division Court, and that the costs of those suits in which nothing is made are apt to exhaust the proceeds of suits in which the debt is recovered. As in Pharaoh's dream, the lean kine devour the fat kine. The percentage of unproductive suits is much greater than in any other Court, and is owing in a large measure to the absence of some one to watch the suit who would know the duties of the officers of the Court and hold them responsible for their performance. The same remark applies to the delay of bailiffs in making returns. A bailiff of one of these Courts seized goods and held them under seizure for six months, stating, whenever pressed by the plaintiff, that he could

## DIVISION COURT JURISDICTION.

not sell. The same goods were then seized for rent, and the bailiff, without notice to the plaintiff, withdrew, and in a few days under the sale for rent, more than enough to have satisfied the execution was realized. The Inspector's report shows that while in a certain Division Court claims to the amount of \$28,000 were placed in suit, only \$9,000 was paid into and out of Court. The records of the County Courts will show that in numerous instances suitors have held claims until the accrued interest would enable them to sue in those Courts.

Since the striking out of fictitious pleas, judgment may be obtained in the County Courts, when there is no defence, at least as speedily as in the Division Courts, and, owing to the more efficient machinery, usually with greater speed. A defendant was recently sued on the same day in the County Court and Division Court in the same city, and judgment was signed and execution issued in the County Court before he was even served in the Division Court.

The desire to furnish cheap law has already been pushed far enough, and, in the opinion of many, to the sacrifice of efficiency. The only dissatisfaction with the present administration of justice, if any exists, seems to be with the Division Courts. The strongest desire, however, is to grow a little more familiar with what we have. If the administration of justice is efficient, it ever has been, and ever must be, attended with expense. It would be as wise to have a cheap judiciary and cheap officers of Courts as to have the action itself framed and conducted by unpaid, and, as a consequence, unskilful hands.

2. To what extent would you advise the increase?

Answered above.

3. To what class of cases should it apply?

Answered above.

4. Besides an increase to the absolute jurisdiction, would it be expedient to give to parties an option to have cases of still larger amount (and whether or no without any limit) tried in the Division Courts where both parties concur?

This also is answered above, and we would merely add that the County Court affords at present all the facilities desired.

5. I should be glad if you would note what, from your experience, you regard as the probable advantages and inconveniences respectively of the increase proposed or recommended.

Answered above.

6. I desire also suggestions as to other amendments, which it would be necessary or proper to make as incident to the change: for example, as to additional security by officers, writ of arrest, &c.

As we are opposed to any change, we have not considered any incidental amendments.

7. Should there be an appeal in the new cases in which jurisdiction would be given?

Should there be any increase in jurisdiction, we are strongly of the opinion that there should be an appeal.

8. I find that some are for abolishing all jurisdiction to recover very small sums. Has your experience led you to form any opinion upon this point?

Our experience is that while Division Courts exist their jurisdiction in small sums should be undisturbed.

9. In case the subject of increasing the jurisdiction of the Division Courts is dealt with next session, I should be glad to consider any other amendments in the Division Court Act which it may be proper to introduce at the same time.

We are of the opinion that the parties to suits should be permitted to serve summonses, as in the other Courts, if they desire, and save the expense of service by an officer. We are also of opinion that the Judge should have power to make an order for payment, or in default commitment, upon the return of the first citation summons. We are further of the opinion that the plaintiff should have power to lay the venue in any Division Court in the County where the defendant resides or the cause of action arose, and the defendant be at liberty to move to change it on the ground of greater convenience.

10. The increase of jurisdiction may materially effect the emoluments of Sheriff

## OSGOODE HALL AND TORONTO OF OLD.

and of some other officers. Is there any just arrangement which could be made by law to alleviate that objection?

As we do not approve of any increase, we have not considered this question.

11. It has been suggested that instead of so many fees to the Clerk, there would be great advantage in substituting one fee. I should like your opinion as to a change of this kind and as to what the fee should be.

A fixed sum of \$1.25 should be paid the clerk on every case placed in suit, as his fee to judgment, subsequent fees as at present.

12. Would it be desirable, and in the interest of suitors, to permit a fee to be taxed to Solicitors, if employed, in the cases falling within any new jurisdiction, which may be given to the Division Courts; and what fees would you suggest?

If any increase should be made in the jurisdiction, most certainly a fee should be taxed of say \$2, to be increased by the Judge to \$10.

13. Would it be desirable, and in the interest of suitors, to allow any and what fees to Solicitors in any cases already within the jurisdiction of the Division Courts?

A fee of \$2, to be increased by the Judge to \$10, should be taxed.

14. Some have proposed, in view of an increased Division Court jurisdiction, to abolish the County Courts. Should this be done? or, on the other hand, should the jurisdiction be increased; and if so, to what amount? and, whether under any and what conditions?

The County Courts should not be abolished and their jurisdiction should be as at present, except as above.

15. I should be glad to know your opinion as to the expediency of limiting appeals from the judgments of the Superior Courts of Law or Equity; and in case you favour such limitation, what you would suggest as the proper limit.

We regard the present law as satisfactory.

Signed on behalf of the Bar,

JAMES A. HENDERSON,  
Chairman.

JOHN L. WHITING,  
Secretary.

Kingston, 8th November, 1878.

## OSGOODE HALL AND TORONTO OF OLD.

The book before us \* is an old friend in a new suit of clothes, furnished up with new pictures of old places and old faces renewed with new engravings—pictures which the “oldest inhabitant” would gloat and be garrulous over, and which his grand son would look at in awe, and wonder what we shall come to hereafter—faces that remind us of the early history of this Province, and the institution of our courts and schools of legal learning.

Some time since (August, 1874) we unearthed for the benefit of our readers a copy of a musty old volume of limited dimensions entitled *Curia Canadenses*, and found therein many things of much interest and provocative of no little merriment. Dr. Scadding's book is not, as that is, devoted exclusively to sketches of the Canadian Law Courts, but it nevertheless contains so much that every Canadian Law Student should know that we should pardon an examiner at a “preliminary” if he were to ask a few questions and (after the publication of these hints of ours) pluck without mercy any hapless juvenile, whose path of reading had not wandered in idle moments through its engrossing pages.

We long for the day when some competent brother will appear, to do for Osgoode Hall what Dr. Scadding has done for Toronto of Old—some one who has battled through the storms of his professional career and found safe anchorage in an honest competence and a snug library, whose memory is good and whose pencil has been active in taking notes. What a field there is certainly to recall

\* Toronto of old: Collections and recollections illustrative of the Early Settlement and Social Life of the Capital of Ontario. By Henry Scadding, D. D., Canon of St. James, Toronto. Willing & Williamson, 1878.

## OSGOODE HALL AND TORONTO OF OLD.

the old worthies of the law in this Canada of ours, to recite their good deeds, to recount the incidents of their lives, to give form to their shadowy outlines and relate the thousand and one good things that have fallen from their lips. For, be it known to all, that if the English and Irish Bench have had their brilliant wits and profound lawyers so has the Bench of Upper Canada.

Some of them have gone to their long home. Alas! that too many of the polished pleasantries and razor-like sarcasms of a Draper have been lost for all time, whilst enough remain to make us the more regret those which have never passed into the traditions of Osgoode Hall. Even the memory of much that has fallen from the lips of ready wit of one of Ireland's many gifted and eloquent sons—one who still adorns our Bench—is rapidly fading away. Why were they not all spoken in a phonographic age, to be unwound for the benefit of those to come thereafter. This, by the by, reminds us of rather a good thing which happened to the learned judge we have "lastly hereinbefore referred to," which we trust he will pardon our publishing. Shortly before the last Parliamentary election, and previous also to an approaching Assize, he was speaking of the coming Circuit to one of the short-hand reporters who accompany the judges and do for them the work of ready writers, and asked the reporter in the innocence of his heart whom he "was going for this time." The man of the stenographic pencil, after looking over his shoulder, whispered cautiously: "I think, sir, I shall go for the Conservatives this time!" One can imagine the horror of the questioner at such an unexpected answer. It was rendered doubly terrible by his remembrance of the fact, that some quarter of a century before, he

had been allied with that party which the reporter was now apparently joining, the latter having, it is said, recently been on the staff of a leading newspaper in the other camp, as well a supporter of its policy. However, as this unwitting judicial canvasser has not yet been put in the pillory by that journal for thus "approaching" one of his officials, we trust he has been forgiven, and that a character, conspicuous for unsullied impartiality, may not be blasted by a story which, though not "too good to be true," is "too good to be lost."

We had intended when we took up our pen, to have done something towards bringing before our readers some of the many things worth noticing, from our stand-point in, Dr. Scadding's *Toronto of Old*. It will perhaps be best to tell them that they should save a little on their consumption of midnight oil, and prolong their lives by shortening the hours of that laborious study which (we presume) is dragging many of them to an early grave, and, by means of this saving, purchase a copy of the book before us, and read for themselves all and much more than could here be told them.

We do trust, however, that some one will soon take up the work that we have shortly alluded to. We trust, moreover, that the much easier task of procuring the portraits of Hon. William Osgoode, first Chief Justice of Upper Canada, and others well known in and about the Lawyer's Hall, will be accomplished—a Hall which bears a name given at the suggestion of the greatest of Canada's sons, Sir John Beverley Robinson, who was also the generous donor of the six-acre field where now stands our Alma Mater. We shall take leave of it in the words of Plinius Secundus in  
uses:

## USE AND ABUSE OF LEGAL HOLIDAYS.

"Farewell Toronto, of great glory,  
Of valour, too, in modern story;  
Farewell to Courts, to Lawyers' Hall,  
The justice seats, both great and small;  
Farewell attorneys, special pleaders,  
Equity draftsmen and their readers.  
Canadian laws and suits, to song  
Of future bard henceforth belong."

## SELECTIONS.

USE AND ABUSE OF LEGAL  
HOLIDAYS.

On Thursday last the Long Vacation came to an end, and from all quarters of the globe counsel and solicitors have returned, or are returning, to the metropolis. Next Saturday the Lord Chancellor will receive Her Majesty's Judges in the customary manner, the Courts of Law will reopen, and practitioners will be as busy as the depressed condition of commerce, manufactures, and agriculture will permit.

Before the lawyers settle down to business, there will be much shaking of hands, and many friendly inquiries. Foremost among the topics of interest will be how our friends have spent the Vacation, and how they have enjoyed themselves. Innumerable are the recreations by which barristers and solicitors seek to regain health and strength after the labours of a legal year; and, for the first few days, there are pleasant comparisons of happy Vacation days. "Have you had good sport on the moors and in the turnips?" for this year there have really been turnips. "Have you been to the Paris Exhibition?" The rival attractions of foreign travel, Alpine climbing, shooting, country visits, seaside sojourn, Doncaster and Newmarket races, are discussed with as much animation as is possible when the coming toil of ten months is in prospect. Since the primitive days when Parliament was prorogued and the Courts adjourned in order that the harvest of England might be gathered, the way to spend the Long Vacation has been a fruitful theme of debate.

Indeed this is a subject of more real importance than would at first sight appear; and just as the professional classes increase in this country, and the things

that can be done multiply, so does the task of discovering how to spend a holiday become more worthy of attention. It is astonishing what a muddle some people make of their leisure time. Bit by bit as the cares of life, the love of money, devotion to business, and bodily infirmity creep on them, away goes even the desire of recreation. Multitudes of men, if lifted in a moment above the necessity of professional labour, would be miserable from the want of something to do, simply because they have made no effort either to retain the skill for manly exercises of which in their youth they were justly proud, or to acquire new modes of healthy recreation for body and mind. They cannot ride, or shoot, or play any game demanding physical exertion; they hate to travel, the country is to them inexpressibly dull, the seaside is vulgar and monotonous. So they reluctantly assent to a fortnight or three weeks' away from town to please their wives; and with that their Vacation begins and ends.

Now, of late years, persons of this class—and we speak not of Englishmen only—have hit upon an idea. They have got up conferences and congresses, and have sought to banish *ennui* by the pursuit of scientific, artistic, and philanthropical objects. This Vacation has been remarkable for meetings of this kind. There has been a Congress of Orientalists at Florence; of German Naturalists at Cassel; an International Prison Congress at Stockholm; a Scandinavian Jurists Congress at Christiania; a Conference on International Law at Frankfurt; a meeting of the Institut de Droit International at Paris; and a sitting of the Associated Chambers of Commerce at Sheffield. Last, but not least, there began on Wednesday at Cheltenham the annual meeting of the National Association for the Promotion of Social Science, not the least important section of which is the Society for Promoting the Amendment of the Law. The Codification of the Criminal Law, the Reform of Real Property Law, Summary Jurisdiction of Justices, Prison Discipline—these are among the subjects to which men who have their bread to earn devote themselves in their hour of leisure, from love

## JUDICIAL EMOLUMENTS.

of their species and their art, and in the pursuit of recreation.

We do not desire to decry the voluntary labours of these holiday-makers. On the contrary, we have always recognised their zeal, and the valuable results flowing from their industry; nevertheless we may point to this modern method of using leisure as a phenomenon of modern life. The manual labourers of our time do not work much more than half as hard as their forefathers; the professional classes seem eager to surpass their predecessors in industry. Even these voluntary workers may boast themselves vastly superior in wisdom to the counsel who spend their Long Vacation in the Temple and Lincoln's Inn, either picking up the crumbs that fall from the rich man's table, or writing legal text-books.

The truth is that life is too short, and the mental and physical constitution of mankind too weak, to stand the pressure of uninterrupted professional labour. Those who fancy that they can devote themselves to law for twelve months in the year, should read Dr. Carpenter's "Mental Physiology" and Dr. Richardson on "Health," and should also regard the examples around them of the necessary effect of unremitting toil—"neque semper arcum tendit Apollo." If we had two existences in this life, and after thirty years of unbroken industry we were allowed thirty years of healthy leisure in which to enjoy the wealth we had earned, the reasonable course would be to give up youth and manhood to severe and protracted labour. But it is not so; and he is most wise who so tempers toil with relaxation as to preserve his mental and bodily vigour to old age.

This admirable result can only be achieved by preserving the physical energy, and cultivating the taste for those bodily exercises which become a man. Wealth and the highest honours of the profession are earned too dearly, if health is sacrificed in the pursuit. In all times members of the legal profession have been celebrated for their capacity for enjoying their hours of ease after a healthy and rational manner. They are noted for longevity beyond all other classes of industrial society, and they ought not now to be induced by the charms either

of congresses or Long Vacation business to destroy the greatest of all blessings—"mens sana in corpore sano."—*Law Journal*.

## JUDICIAL EMOLUMENTS.

If there be consolation in the reflection that others are still worse circumstanced than ourselves, the underpaid judiciary of Canada may find a crumb of comfort in the fact that in Vermont the salaries of the Supreme Court judges are placed at the figure of \$2,500 per annum, and a bill is actually before the Legislature to reduce this magnificent emolument to \$2,000. It is clear that the Vermonters believe in plain living as the best regimen for hard-worked men. Our contemporary, the *Albany Law Journal* pertinently remarks: "A salary of \$2,500 is not usually regarded as extravagant for a competent judge of a court of last resort, even in those States where judicial talents is not rated high. The Supreme Court of Vermont has always enjoyed a good reputation for ability, but we much doubt if that reputation can be maintained at the figures proposed. Even the most disinterested judge could hardly afford to serve the State for remuneration so inadequate and so much below what he could make at the bar."

In connection with this topic, we may refer to the scale of remuneration in some other places. An official report which has just appeared in France, states that the salaries of the Court of Cassation, consisting of fifty-six members, are equal in the aggregate to \$210,000. The salary of the first president is \$6,000 per annum. The other three presidents each receive \$5,000 a year. The forty-five councillors have \$3,600 each, while the salaries of the six procureurs-généraux, and avocats-généraux vary from \$3,600 to \$6,000. The cost of the several courts of appeal is estimated at \$1,207,260, which is divided amongst 26 first presidents, 92 other presidents, 617 councillors, 94 procureurs généraux, and avocats généraux, and 61 substitutes. The salary of the first presidents is usually \$3,000, while the other presidents for the most part get only \$1,500.

If we wish to go where judicial talent

Chan.]

NOTES OF CASES.

[Chan.]

seems to have been recompensed on the humblest scale we must take ourselves to Cyprus, the new acquisition of Great Britain. The salary of the judges who formerly constituted the Court at Larnaca, according to the *Times'* correspondent, was about £2 per month; but it is supposed that "a certain class of fees from suitors, not strictly defined by law, were found evocative of zeal." However this may be, the addition of an English assessor to the Court has caused the collapse of the tribunal. All irregular fees having ceased under the new régime, one of the members of the Court has resigned, and another has persistently absented himself on private business, and the authorities are puzzled to devise a means of supplying the vacancies. The *Solicitors' Journal* suggests, in case all other measures fail, that they should resume the system of judicial remuneration which for several hundred years contented the judges of another island within the British dominions. The judges of the Royal Court of Jersey, down to a recent date, were remunerated by a dinner at the opening of the *assise d'héritage*, which was paid for by the Queen's Receiver out of the revenues arising from the crown property in the island.—*Legal News*.

## NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED  
IN ADVANCE, BY ORDER OF THE  
LAW SOCIETY.

### CHANCERY.

Chancellor.]

[Nov. 11.]

LEY V. WRIGHT.

*Injunction—Execution creditor.*

*Held*, following the ruling in *Wason v. Carpenter*, 13 Gr. 329, that a judgment creditor with *A. fa.* against lands in the hands of the Sheriff is entitled to an injunction against the execution debtor to restrain the felling of timber to such an extent as would impair the value of the security.

Chancellor.]

[Nov. 11.]

FOLLEY V. FOLLEY.

*Amending bill at hearing—Practice.*

By one paragraph of the plaintiff's bill, an

ouster by the defendant was alleged at such a date, and continued possession since, as would, if true, have defeated the plaintiff's claim to relief, but this statement was not proved, and the Court being of opinion that the title of the plaintiff was clearly made out, directed the objectionable paragraph to be expunged, it being evident from the course the suit had taken that the defendant would not be taken at any disadvantage thereby.

Chancellor.]

[Nov. 11.]

GAYLOR V. MORRISON.

*Infant—Fraudulent concealment—Fraudulent conveyance.*

The defendant being the owner of land, six months before attaining majority applied to the plaintiff for a loan of money on the security thereof, concealing the fact of his infancy, and on the contrary asserting to the solicitor of the plaintiff that he was of full age, and the plaintiff in good faith made the advance, taking a mortgage on the land to secure its repayment. The money thus obtained the mortgagor applied to the purchase of other lands which, together with those already mortgaged to the plaintiff, he immediately, after attaining 21, conveyed, without consideration, to his mother:

*Held*, that the conveyance to the mother was fraudulent and void as against the plaintiff, who was declared entitled to be paid the full amount of principal and interest due on the mortgage, together with the costs of suit, or in default that the lands should be sold.

Chancellor.]

[Nov. 11.]

MACHAR V. VANDEWATER.

*Principal and agent—Vendor and purchaser.*

The rule is that the agent of an intending purchaser is bound to communicate to his principal any information coming to his knowledge that can affect his principal's determination as to proceeding with or abandoning the proposed purchase; but the same conduct is not required to be exercised by the agent in selling to such principal property of the same kind which, to the knowledge of the principal, belongs to the agent: Therefore where the plaintiff applied to the defendant to ascertain at what price he could obtain certain shares in an Insurance Company, and for which services the plaintiff offered to pay him a commission (though declined by the defendant), and in answer to the agent the Manager of the Company made such statements as shewed that the stock was utterly worthless, notwithstanding which the defendant allowed the purchase to be concluded without communicating the information then received; the Court ordered the agent to recoup the principal the amount of his pur-



## ELECTION CASES.

chase money with interest, and pay the costs of the suit; although, in respect of 30 shares of the same stock sold by the agent as his own, the Court refused to grant any relief.

Chancellor.]

FLEURY V. PRINGLE

[Nov. 18.

*Fraudulent conveyance—Husband and wife.*

A debtor, in insolvent circumstances, and his wife conveyed land subject, to a mortgage in which the wife had joined, to a *bona fide* purchaser, and took a note in favour of the wife for better than half of the purchase money, the balance being paid to the husband. This note was subsequently transferred by the wife to J. M. on the conveyance to her of the vendor's equity of redemption in other lands:

*Held*, that an execution creditor of the husband could follow the amount, so paid, into the lands purchased from J. M.

but upon the counterfoil, and that at any rate the error or omission was the fault of the Deputy Returning Officer and not of the elector, and that the voter having done what the law required and no more, should not be deprived of his franchise

*French*, contra, contended that the figure upon the counterfoil was a "mark by which the voter could be identified," as a corresponding figure had been placed before the name of the voter upon the poll book.

*The Monck Election Case*, 12 C. L. J., 113, was cited.

MCDONALD, Junior County Judge. In my opinion the Deputy Returning Officer committed a grave error in omitting to tear off the counterfoil; although I am satisfied that it was an unintentional mistake.

I was at first inclined to think that there was something in Mr. Fraser's contention that the mark was not upon the ballot paper as it was on the counterfoil. But more mature consideration has satisfied me that the mark is to all intents and purposes upon the ballot paper. In my opinion, the intention of the law is that only those ballot papers are to be rejected upon which there is a writing or mark by which the voter could be identified, made by him or with his privy or consent. To hold otherwise, would be a great injustice to an elector. A Deputy Returning Officer, who wished to know how a particular elector voted, might easily do so by tearing off the counterfoil in a particular way or making some slight mark which would at the moment escape the attention of the voter and scrutineers, and yet, if Mr. French's contention was to prevail, the vote would have to be rejected. As contended by Mr. Fraser, this would give a Deputy Returning Officer practically the power to disfranchise a constituency. I cannot imagine that the Legislature intended to confer such powers or to make such a stringent enactment as Mr. French argues for. It is my duty to lean as far as I properly can in favour of the franchise, and therefore, even if I were in doubt, it would be my duty to confirm the decision of the Deputy Returning Officer and allow the vote; but I really have no doubt upon the point, and consequently allow the vote to Mr. Wiser.

## CANADA REPORTS.

## ONTARIO.

## ELECTION CASES.

## SOUTH GRENVILLE ELECTION.

*Re-count of ballots by County Judge—Marked ballots—Identification of voter.*

*Held*, that a marked ballot should not be struck out unless the mark by which the voter could be identified was made by him or with his privy or consent. Therefore, when the ballot was given to the voter in proper shape, properly marked by him, and handed to the Deputy Returning Officer who put it in the ballot box without tearing off the counterfoil upon which was a number by which the voter could have been identified, the vote was *held good*.

But where a Deputy Returning Officer put upon the ballots numbers corresponding to the numbers opposite the names of voters on the pointed list, and the voters used these, and returned them to the Deputy, *held* that they adopted his act and that the votes were bad, and should be struck off.

[Brockville, October, 1878.

Upon recounting the ballots allowed by the Deputy Returning Officer for the West Ward of the Town of Prescott, it was ascertained that a ballot had been counted for Mr. Wiser, from which the Deputy Returning Officer had omitted to tear the counterfoil, and the number appeared upon the latter.

*French* contended that the ballot-paper must be rejected.

*Fraser*, Q. C., contra, argued that the figure or number did not appear upon the ballot paper,

In the first polling sub-division of the Township of Augusta, the Deputy Returning Officer placed upon each ballot paper as it was given

## DIGEST OF ENGLISH LAW REPORTS.

voter's name on the printed list, It was then given to the voter, and after he had entered his vote and returned it, the Deputy deposited it in the box. Although the Judge declined to take any evidence (holding he had no power to do so), it was admitted that this course of proceeding was kept up until a late hour of the day, when an elector declined to use a ballot paper upon which such a number was written. This appeared to have opened the eyes of the Deputy Returning Officer to his mistake, and he discontinued the practice.

*French* contended that the votes were bad.

*Fraser, Q. C., contra.*

*McDONALD*, Junior Judge, held that the votes were bad, inasmuch as the voter by using the ballot paper adopted the act of the Deputy Returning Officer, and voluntarily entered his vote upon a ballot paper upon which was a mark by which he could be identified. However, as the point was one of great importance, he signified his desire of obtaining the opinion of a Superior Court Judge at Toronto.

## ENGLISH REPORTS.

### DIGEST OF THE ENGLISH LAW REPORTS FOR MAY, JUNE, AND JULY, 1878.

(Continued from page 303)

2. The plaintiff and the defendant company were tenants of adjoining land under the same lessor, and the company's lease required it to maintain a fence around its land, for the benefit of the lessor and his other tenants. Twenty years ago, the predecessors of the company in title built a wire fence about the land, and the company repaired it from time to time; but in lapse of time the wires rusted, and pieces fell off into the grass on the plaintiff's land, and plaintiff's cow grazing there swallowed a piece from the effects of which she died. *Held*, that the company was liable for the value of the cow.—*Firth v. The Bowling Iron Company*, 3 C. P. D. 254.

See *DEMURRER*; *RAILWAY*, 1.

*NUPITAL SETTLEMENT*.—See *SETTLEMENT*, 1, 2.

*OFFICER*.—See *QUO WARRANTO*.

*ONUS PROBANDI*.—See *SLANDER*.

*OPTION TO PURCHASE*. See *INSURANCE*.

*ORIGINAL GIFT*.—See *WILL*, 3.

*OSTENSIBLE PARTNER*.—See *PARTNERSHIP*, 3.

*PARTIES*.—See *HUSBAND AND WIFE*, 2, 3;  
*MORTGAGE*, 2.

*PARTNERSHIP*.

1. By partnership articles between the plaintiff and the defendant, the defendant covenanted not to "engage in any trade or business except upon the account and for the benefit of the partnership." After the partnership had been dissolved, the plaintiff learned that the defendant had been, during the partnership, a partner in another business, and had realized profits from it; and he thereupon filed two bills, one for an account of defendant's profits in the other business, and another for a declaration that defendant's interest in the other business was assets of the partnership with himself. The first bill was dismissed without costs. If the plaintiff had any case, it was a case for damages. The second bill was dismissed with costs.—*Dean v. McDowell. Same v. Same*, 8 Ch. D. 345.

2. In 1861, partnership articles were entered into between the plaintiff and the defendant to carry on the business of ironmongers, for twenty-one years, at the R. premises, "or in such other place or places as the said parties hereto may agree upon." In 1863, the partners agreed that henceforth the business should include that of ironfounders; and they purchased foundry works at Q., where the foundry business was carried on until 1876, when the lease of the Q. premises ran out. The plaintiff declined to renew the lease, and wished to give up the foundry business. The defendant thought otherwise, and finally took a lease of the Q. premises in his own name, but, as he said, for the firm, and proposed to continue the foundry business there. Plaintiff moved for an injunction and for a dissolution of the partnership and for a receiver. *Held*, that the defendant had no authority to renew the lease, and the plaintiff was entitled to an injunction against carrying on the foundry business in the name and with the assets of the firm. Receiver refused.—*Clements v. Norris*, 8 Ch. D. 129.

3. In 1875, the firm of H., C., & P. was dissolved, and notice was given by them that the business would be carried on by P. alone. P. undertook to pay H. a balance due him from the old firm. From that time, the business was carried on under the name of P., Son & Co. The bank account was in that name; and the son drew and accepted bills, negotiated loans, and sometimes ordered goods, in the name of the firm, and performed all these acts with authority. He never sold goods. On the outside of the premises the name P. alone ap-

## DIGEST OF ENGLISH LAW REPORTS.

peared. In 1877, the firm failed, and the creditors prepared a petition in bankruptcy against P., trading as P., Son & Co.; but it was finally decided to file the petition against P. and the son, as joint traders, and a resolution for liquidation by arrangement was registered. P. had no separate estate apart from his interest in the business; and H., being the only separate creditor, appealed from the order to register, and the registration was cancelled. A firm creditor then filed a petition in bankruptcy against P. and the son, as a firm, and they were adjudged bankrupt, with their consent. An application by H. to annul the adjudication was refused, and no appeal taken. H. then applied for a declaration that the assets of the business be declared separate estate of P. Both P. and the son testified that the son was not a partner, though he took the position of partner, and that it was the intention to make him one if the business turned out profitable; as, however, was not the case. The petitioning creditor and eight other creditors (there being eighty-two in all) testified that they always considered P. & Son as partners, and the petitioning creditor said the debtors had told him they were partners. P. told a creditor on one occasion that his son had married a lady of means, and on that ground asked for further credit, which was given him. *Held*, that there was a partnership, and the assets must be treated as joint estate. — *Ex parte Hayman. In re Pulsford*, 8 Ch. D. 11.

See ARBITRATION; BANK, 1.

PASSENGER.—See RAILWAY, 1.

PATENT.—See TRADE-MARK, 2.

PENALTY.—See JUDGMENT.

PLEADING AND PRACTICE.—See ATTORNEY AND CLIENT, 1, 2; COSTS; DEMURRER; HUSBAND AND WIFE, 2, 3; PARTNERSHIP, 1, 2; QUO WARRANTO; SOLICITOR.

POST-NUPTIAL SETTLEMENT.—See SETTLEMENT, 1.

POWER.—See INFANT; SETTLEMENT, 2.

PRACTICE.—See PLEADING AND PRACTICE.

PRINCIPAL AND AGENT.

In 1868, the plaintiff, registered owner of a steamship, consigned it to G. in Japan for sale. G., with the plaintiff's approval, employed the defendant to sell the vessel, and a minimum limit of \$90,000 net cash was fixed as the price. The defendant tried to sell, but without success, and had some correspondence with G., in which he suggested that he would become the purchaser at the price fixed for cash, and himself run the risk of obtaining more on a resale, by means of giving credit; but no agreement was come to on the subject. March 12, 1860, he wrote that he would take the vessel himself

at \$90,000. March 17, he sold her to a Japanese prince for \$160,000: \$75,000 cash, and the balance credit. This sale was the result of negotiations extending over some time. The plaintiff received the \$90,000 from the defendant through G., and the defendant finally received the \$160,000 in full from the prince. The plaintiff did not know that the defendant was the purchaser, or of the resale, until June, 1869, when the transaction was ended, and he made no claim on defendant until 1873, although they met frequently. *Held*, that the defendant must account to the plaintiff for the profit made by the resale, and that the plaintiff had not forfeited his right to relief by his laches or by acquiescence. — *De Bussche v. Alt*, 8 Ch. D. 286.

See BANK, 2.

PRINCIPAL AND SURETY.—See SURETY.

PRIVILEGED COMMUNICATION.—See ATTORNEY AND CLIENT, 1, 2.

PRIVITY OF CONTRACT.—See PRINCIPAL AND AGENT.

PROFITS.—See Partnership.

PROMISSORY NOTES.—See BILLS AND NOTES.

PROXIMATE CAUSE.—See NEGLIGENCE, 1.

PUBLIC CORPORATION.—See CORPORATION.

QUIET ENJOYMENT.—See LANDLORD AND TENANT, 3.

QUO WARRANTO.

An officer of a board of health was illegally dismissed from his office. On application for *quo warranto* by him, it appeared that he could be legally dismissed by the authority complained of, and that, as matter of fact, he would be if reinstated; and the rule was refused. — *Ex parte Richards*, 3 Q. B. D. 368.

RAILWAY.

1. Plaintiff, travelling on defendant's road, requested a servant of the road to take charge of and put into his compartment his hand-bag, while he went for some lunch. The servant promised to look after it, put it into the compartment, and turned the key, and, when plaintiff came back, said it was all right. On entering the compartment, plaintiff found the bag was missing. The jury found that the proper place for the bag was in the compartment; that the servant was acting as servant of the company, and within the scope of his employment; that there was no negligence on the part of anybody; and that the bag was stolen by some one unknown. *Held*, that the plaintiff could not recover. The company was not liable as a common carrier, not having complete control of the goods, nor as insurer. — *Berghem v. The Great Eastern Railway Co.*, 3 C. P. D. 221.

## DIGEST OF ENGLISH LAW REPORTS.

2. 8 Vict. c. 20, enacts that "if any person travel . . . in any carriage" . . . of a railway company, without paying his fare, "and with intent to avoid payment," . . . such person shall forfeit 40s.; that the company may make regulations "for regulating the travelling upon . . . the railway," subject to the provisions of the Act; that it may make by-laws for the better enforcing of such regulations, provided, "such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provision of this or the special Act; . . . and any person offending against any such by-law shall forfeit . . . any sum not exceeding £5 . . . as a penalty." The respondent company, accordingly, made a by-law as follows: "Any person travelling . . . in a carriage . . . of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall, in addition, be liable to pay his fare according to the class of carriage in which he is travelling, . . . unless he shows that he had no intention to defraud." Defendant was convicted in a penalty of 10s. under this by-law of riding in a first-class carriage with a second-class ticket, but without intending to defraud the company. *Held*, that the conviction could not stand; for, without deciding whether the by-law was to be construed as exempting from the penalty as well as from the double fare, in the absence of intent to defraud, if the by-law undertook to dispense with proof of intent to defraud, it was *ultra vires*, and void by said 8 Vict. c. 20.—*Bentham v. Hoyle*, 3 Q. B. D. 289.

3. A railway company, in undertaking to convey luggage to a station, thereby contracts to keep it safely for such a time after its arrival reasonably necessary to enable the passenger to get it and take it away.—*Patscheider v. The Great Western Railway Co.*, 3 Ex. D. 153.

RATIFICATION.—See SETTLEMENT, 1.

RECEIVER.—See ARBITRATION.

RECEIPT.—See WAIVER.

RELATION.—See INSURANCE.

REMOTE DAMAGES.—See NEGLIGENCE, 1.

RESIDUARY LEGATEE.—See WILL, 1.

RESULTING TRUST.—See SETTLEMENT, 2.

RIGHT OF WAY.—See WAY.

SALE

1. W. Blenkiron & Son, a well-known and responsible firm, did business under that style at 125 Wood Street. One A. Blenkarn ordered goods of the respondents by letter, dated "37 Wood Street." The letters were signed without any initial, and in a manner to look very much like "Blenkiron & Co." Respondents

sent the goods to "Messrs. Blenkiron & Co., 37 Wood Street," supposing they were dealing with W. Blenkiron & Son. A. Blenkarn was subsequently convicted for falsely pretending, in obtaining these goods, that he was W. Blenkiron & Son. Meantime, the appellants had bought in good faith some of the goods of A. Blenkarn. The respondents brought trover for the goods. *Held*, that there was no contract of sale between the respondents and A. Blenkarn, and accordingly he could give, and the appellants could acquire, no title to them.—*Cundy v. Lindsay*, 3 App. Cas. 459; s. c. 1 Q. B. D. 348; 2 Q. B. D. 96; Am. Law Rev. 104, 702.

2. Plaintiff and one P. made a contract for a lot of lumber, to be purchased of P. by plaintiff, and shipped from time to time as it was ready. Subsequently, P. shipped a lot of six hundred tons on a ship chartered by him, by the order and for the account of the plaintiff. The bills of lading stated the goods to be shipped by P., to be delivered "to order or assigns" of P. Plaintiff insured the cargo. P. drew a bill of exchange on the plaintiff, and indorsed it to one C., with the bills of lading. C. discounted the bill at defendant's bank, handing the bank the bills of lading with it. Plaintiff declined to accept the bill without the bills of lading. Thereupon P. drew a second bill to the order of C. on the plaintiff, which was given the defendants in place of the first, "upon the terms of the delivery of the bills of lading to the plaintiff, upon payment of the second bill of exchange." The bills of lading and the bill of exchange reached the plaintiff the same day, the bills of lading "to be given up against payment of" the draft. Plaintiff refused to accept the bill of exchange, and returned it to defendant bank, stating he should pay it at maturity. The cargo was then entered at the custom-house in the name of the defendant. Afterwards, plaintiff offered to pay the bill on receiving the bills of lading, and to give a guarantee for the freight, which the defendant bank pretended to think itself liable for. This was refused, and defendant subsequently sold the cargo. The jury found that P., as well as plaintiff, intended the cargo should be the property of plaintiff on shipment, subject to a lien for the price. *Held*, that the property in the cargo had passed to plaintiff, and he could recover from defendant bank.—*Mirabita v. The Imperial Ottoman Bank*, 3 Ex. D. 164.

3. Property was sold at public auction under certain conditions. The auctioneer entered in his book the names of the seller and buyer, the description of the property and the price, but made no reference to the conditions. *Held*,

## DIGEST OF ENGLISH LAW REPORTS.

not to be a sufficient memorandum in writing to satisfy the Statute of Frauds.—*Rishton v. Whatmore*, 8 Ch. D. 467.

4. In 1873, G. borrowed £450 of H., giving a verbal promise to give a bill of sale when demanded. H. died in 1874, and her executors were told by G. that he had promised to give a bill of sale, and was ready to do so at any time. They did not demand it; and, in 1877, the executors, hearing that a writ had been served on G., asked for and received a bill of sale of all G.'s property, except book-debts. There was no recital as to when the advance was made, nor of a past promise. The document was duly registered the next day; and two weeks afterwards, being the 17th, G. was served with a debtor's summons. G. notified the executors, who took possession on the 19th, advertised and sold the property on the 23rd. Subsequently, G. was adjudged bankrupt. *Held*, that the bill of sale was not good against creditors.—*In re Gibson. Ex parte Boland*, 8 Ch. D. 230.

## SALVAGE.

1. In an action of salvage against a ship on behalf of the owners, masters, and crew of two steam-tugs, it appeared that one tug, while towing a vessel, saw the ship ashore and in distress, and went off her course to notify the other tug of the accident, and the other tug proceeded to the spot, and saved the ship. *Held*, that both tugs were entitled to salvage.—*The Sarah*, 3 P. D. 39.

2. The steamship S., in distress from a collision, signalled the steamship C., and transferred to her the passengers and some of the cargo. Attempts to tow the S. by the C. failed, and she was abandoned, and her crew were taken on board the C., and they, with the passengers and cargo saved, landed in port. In an action by the owners, master, and crew of the C., against the saved cargo of the S., life-salvage was claimed, and also salvage for services to the S., and in saving the cargo. The owners of the cargo cited in the owners of the S., who appeared. The owners of the cargo asked that such portion of the salvage awarded as was life-salvage the owners of the S. should be required to pay. Refused, on ground that no property of the owners of the S. was saved.—*The Cargo ex Sarpadon*, 3 P. D. 28.

See SHIPPING AND ADMIRALTY.

SEPARATE ESTATE.—See HUSBAND AND WIFE, 2.

SEPARATE USE.—See MARRIED WOMEN, 1, 2.

SERVICE OF PROCESS.—See SHERIFF, 1, 2.

SET-OFF.—See COSTS.

## SETTLEMENT.

1. Defendant, when an infant, agreed to give

seven houses to his intended wife, when he came of age. Fourteen years after the marriage, he executed a post-nuptial settlement, giving nine houses—among which were the aforesaid seven—to trustees, for the separate use to his wife for life, then to himself for life, with power of appointment in the wife as to the disposition after the death of the survivor, and, in default of appointment, in trust to the wife in fee. No reference was made to the above agreement, and it was recited that he had made no settlement in favour of his wife on occasion of his marriage. Afterwards, he agreed to sell three of the houses; and, in an action for specific performance, *held*, that there had been no ratification of the agreement as to the seven houses made when the defendant was an infant; that the post-nuptial settlement was voluntary, and there must be specified performance as to the three houses. *Honywood v. Honywood*, (20 Beav. 451) incorrectly reported, and not much to be relied upon, per JESSEL, M. R.—*Trowell v. Shenton*, 8 Ch. D. 318.

2. In 1855, a marriage settlement was executed by D., to make provisions for his intended wife and the children of the marriage, by which land was given in trust to such uses, &c., as D. and his wife should appoint, and, in default of appointment, to D. for life; the remainder to the wife for life; remainder to the children as tenants in common in fee; remainder, in case of the death of all the children under twenty-one without issue, to the heirs and assigns of D. There was a proviso that the trustee or his successor should, after death of the survivor of D. and his wife, leaving a minor child, receive the rents and profits of such child's share, and, after paying for the child's maintenance, &c., invest the balance, and accumulate it for those who should become ultimately entitled to the share from which the same came. There was no power of sale. In 1860, D. and his wife mortgaged the land to E., and appointed it to him, subject to redemption; and E. covenanted to convey on payment of the debt and costs to such uses, &c., as the property was then subject to. There was a power of sale providing that the balance of proceeds of the sale, after deducting the debt and costs, should be paid over to "D., his heirs, executors, administrators, or assigns." In 1869, D. died intestate, leaving his wife and children surviving. In 1875, the mortgagee sold the premises under his power, and held the balance subject to the order of the Court. *Held*, that D.'s administratrix took the surplus as personal property. This was no resultant trust.—*Jones v. Davies*, 8 Ch. D. 205.

See HUSBAND AND WIFE, 1; MARRIED WOMEN, 2.

## DIGEST OF ENGLISH LAW REPORTS.

## SHERIFF.

1. A sheriff, with a writ *fi. fa.*, took a keeper to the debtor's house, showed the writ, and said, if the amount was not paid, the keeper would remain in possession. The debtor paid at once. *Held*, that there had been a seizure, and the sheriff was entitled to poundage.—*Bisnick v. The Bath Colliery Co. Ex parte Bissicks*, 3 Ex. D. 174; s. c. 2 Ex. D. 459; 12 Am. Law Rev. 508.

2. A sheriff, under a *fi. fa.* writ, made a seizure of goods, and was then paid the amount by defendant, without sale. *Held*, that there had been a "levy," and he was entitled to poundage. *Roe v. Hammond* (2 C. P. D. 300) overruled.—*Mortimore v. Cragg*, 3 C. P. D. 216.

## SLANDER.

Where the Court has laid down that the occasion on which the words complained of were uttered was privileged, it is for the plaintiff to show affirmatively that the defendant acted maliciously, or from an improper motive, and not from a sense of his duty, and *bona fide*.—*Clark v. Molyneux*, 3 Q. B. D. 237.

## SOLICITOR.

Where a plaintiff's solicitors of record in London employed his country solicitors to get evidence, and one member of the country firm did all the business alone, but had some affidavits sworn to before his partner, *held*, that these affidavits were inadmissible.—*Duke of Northumberland v. Todd*, 7 Ch. D. 777.

See ATTORNEY AND CLIENT, 1, 2.

SPECIFIC LEGACY.—See WILL, 5.

SPECIFIC PERFORMANCE.—See CONTRACT, 2.

STATUTE.—See RAILWAY, 2; TAXES.

STATUTE OF FRAUDS.—See FRAUDS, STATUTE OF.

SUB-AGENT.—See PRINCIPAL AND AGENT.

## SURETY.

One E., an insurance agent, committed acts which his principal, an insurance company, was advised amounted to embezzlement, and the company ordered his arrest. Thereupon, some friends of E. had an interview with the company's manager, and proposed an arrangement by which the company should be secured and E. go free; but the manager refused to consider it. Later on the same day, the company was advised that E.'s acts did not amount to embezzlement, and the order for his arrest was thereupon countermanded. Two days after, E.'s friends, not knowing the order for arrest had been stopped, and not being informed of it by the company, made arrangement by which they became surety for E., by depositing a sum to be held as collateral security for the payment by E. of the amounts due the company from him. The sums not being paid, the com-

pany sued for this deposit against the sureties, and the latter brought a cross-action to annul the agreement. *Held*, that the agreement was not binding on the sureties, as having been made by them under the supposition that E. was liable to be arrested, to which supposition they were led by the company. *Semble*, also, that the agreement was bad, as savouring of compounding with felony; but the Court would interfere actively, and not stay its hand in such a case.—*Davies v. The London and Provincial Marine Ins. Co.*, 8 Ch. D. 469.

## TAXES.

A taxing act must be construed strictly, *per* the Lord Chancellor (LORD CAIRNS).—*Cox v. Rabbits*, App. 3 Cas. 473.

TENANT IN COMMON.—See TRUST, 1.

THELLUSON ACT.—See WILL, 2.

## TRADE-MARK.

1. In 1830, plaintiffs began making, at Angostura, Venezuela, a fluid which they called "Aromatic Bitters," and sold in England and other countries. In 1847, the name of the town of Angostura was changed to Ciudad Bolivar; but it continued to be called in England by the old name, and plaintiffs' stuff was generally known there as "Angostura Bitters." In 1870, defendant began making a different fluid at Ciudad Bolivar, from a process discovered by him at Upata. This he called "Aromatic Bitters;" but being enjoined in a suit by the plaintiff, by the English court at Trinidad, in 1874, from using that name, he adopted that of "Angostura Bitters." The bottles used by him were similar in size and shape to those of plaintiffs; and the words and descriptions on the wrapper were very similar, except that it was stated distinctly enough that the stuff was prepared by defendant, while plaintiffs had a like statement as to themselves. Defendant had his wrapper duly registered at Stationers' Hall. In 1875, plaintiffs removed to Port of Spain, Trinidad, and altered their wrapper by having printed thereon "Aromatic Bitters or Angostura Bitters," and notice of the removal. There was evidence that persons of skill had bought the defendant's bitters thinking they were those of plaintiffs. In an action to restrain the defendant from using the name "Angostura Bitters," and from imitating plaintiffs' wrapper so as to mislead the public, *held*, that the injunction should issue; but that if the defendant had discovered the plaintiffs' secret, and made the same stuff, he could not be enjoined.—*Siebert v. Findlater*, 7 Ch. D. 801.

2. The plaintiff got a patent for a kind of floor-cloth, in 1863, and continued the sole manufacturer thereof until the expiration of

## DIGEST OF ENGLISH LAW REPORTS.

the patent. He devised the name "Linoleum" for his article, and no one else had ever undertaken to use that name until after the expiration of the patent, when the defendants proposed to manufacture the article under that name. *Held*, that the plaintiff was not entitled to protection in the sole use of the name.—*Linoleum Manufacturing Co. v. Nairn*, 7 Ch. 834.

3. W. owned all the collieries in the parish of R., except one belonging to the "W. Coal Co." For some time prior to 1873, W. worked her collieries, using her own name and the designation "The R. Coal Works." In 1868, the defendants set up at R. as coal merchants, styling themselves "The R. Coal Company." Thereupon, in 1873, the plaintiff changed her style to "W.'s R. Collieries." In 1875, defendants bought out C. & Co., bankrupt retail coal-dealers at G., in Surrey, and continued their business there, advertising themselves "The R. Colliery Proprietors, . . . (Late C. & Co.) . . . Supply direct from the collieries." This was followed by a specification of kinds of coal mined at plaintiff's R. collieries. On their office they put "The R. Colliery Proprietors Coal Office." The plaintiff remonstrated, and the sign was changed to "The R. Coal Co., Colliery Proprietors. Coal Office." Subsequently, in 1876, defendants for the first time became proprietors of a colliery, by leasing not one in the parish of R., but within a district called the "R. District," all the coal from which was known in some places as "R. Coal." *Held*, that the defendants were not authorized to use the designation "The R. Colliery Proprietors," they having no colliery in the parish of R., or to use any form implying that they sold coal from that parish; and that it was unnecessary for the plaintiff to prove actual damage to entitle her to prevail.—*Braham v. Beachin*, 7 Ch. D. 848.

## TRUST.

1. A testatrix devised real estate to D., her solicitor, and M., a neighbour, whom she saw very little of, as tenants in common, absolutely and free from any trust. She had told her solicitor that she wished to leave her property for charitable purposes, and he had explained to her that she could not so dispose of her real estate. M. had no communication with the testatrix about the matter, and did not know until her death that the property had been given to him. D. explained to her, when she proposed to leave the property to D. and M. absolutely, that they could put the money in their own pockets if they chose; and she replied that she was aware of that, and intended to give it absolutely, and she had no

doubt they would make a good use of it. Appended to the will was a statement signed by the testatrix stating that she had made the gift to enable D. and M. to assist certain institutions in which they knew she was interested, in case they saw fit, and not otherwise; but that she had imposed no secret trust upon them, nor had they given her any promise to apply the money in any way but for their personal benefit. *Held*, that there was no trust imposed either upon D. or M., and the devise was good.—*Rowbotham v. Dunnell*, 8 Ch. D. 430.

2. Bequest of £3,000 to trustees, to hold for the three minor daughters of testator's deceased daughter until the youngest survivor thereof attained twenty-one, and then to divide the principal and accumulation among the survivors. The trustees were directed to apply the whole or such part of the income, as the trustees should think fit, to the maintenance and education of the daughters while under twenty-one. The father of the legatees applied to have the whole of the income paid him for their education and maintenance, instead of a small portion thereof allowed him by the trustees. His income was only £200 a year; he had five children by a second marriage, and had contracted debts in maintaining the three daughters of his first wife at school. *Held*, that the court could control the discretion given the trustees; and it was ordered that the trustees pay the whole of the income to the father for the future, as well as what had already been withheld and accumulated.—*In re Hodges. Davey v. Ward* 7 Ch. D. 754.

See BANK, 1.

ULTRA VIRES.—See CONTRACT, 2; RAILWAY, 2.

VENDOR AND PURCHASER.—See SALE.

VOLUNTARY SETTLEMENT.—See SETTLEMENT, 1.

## WAIVER.

The defendant executed a deed covenanting to pay the plaintiff £400 on demand with interest; and it was provided that the debt should run two years, if the interest should be "punctually" paid; and the defendant charged his leaseholds with the debt, and agreed to give a formal mortgage on them on demand. Six months' interest becoming due and not being paid, the plaintiff demanded the £400 and interest or a formal mortgage. The defendant paid the interest, and the plaintiff gave a receipt for it "without prejudice to the notice." He offered to accept an instalment of £100. *Held*, that neither receipt of the interest nor the unaccepted offer operated as a waiver of plaintiff's right to recover the whole at once.—*Keene v. Biscoe*, 8 Ch. D. 201.

## DIGEST OF ENGLISH LAW REPORTS.

## WAY.

The defendant owned a house with a gateway under it, and a yard in therear, partly covered. The road under the gateway and the yard were paved with stones, and there was no other approach to defendant's stables in the rear, where he kept his horses; allowing his vans, when not in use, to stand in the yard. Defendant leased the yard to the plaintiff, with power to erect a building suitable for his business of gas-engineer. Plaintiff was not "to obstruct the entrance and gateway, except by the use of the entrance for the purposes of ingress and egress." Plaintiff erected his building, to which, as to the stables, there was no approach except by the paved way. Plaintiff applied for an injunction to restrain the defendant from obstructing the way with his vans, and alleging damage to his business from such obstruction. *Held*, that under the lease he had a general right of way unobstructed.—*Cannon v. Villars*, 8 Ch. D. 415.

## WILL.

1. A testator directed his executors "to pay my . . . debts out of the proceeds of my property." Then followed, "Whereas I am possessed of landed and chattel property, as stated in the annexed schedule, I direct my executors to sell" four pieces of landed property named "for its full value." A fifth piece was then devised to W. for life, remainder to F., ultimate remainder to T., and T. was made residuary legatee. Several legacies were given. The will was written on three sides of a sheet of paper; the signature and attestation were at the bottom of the third page. The fourth page contained a schedule of testator's landed property, and was headed "Schedule referred to within." It contained the four pieces ordered to be sold; and at the bottom of the schedule the statement that the fifth "is not included in the above schedule, it being willed by me to W.: my executors have no control over it." The schedule was signed by the testator and bore the same date as the will. The attesting witnesses to the will knew nothing about the schedule. *Held*, that the schedule formed no part of the will, and could not be referred to in construing the will; but that by the will proper all the real estate, except the specific devise to W. was to be turned into money, for the general purposes of the will, and that what remained went to T., the residuary legatee, and not to the heir-at-law.—*Singleton v. Tomlinson*, 3 App. Cas. 404.

2. H. died April 16, 1852, leaving a will, by which he devised real estate to trustees for his wife, during her life or widowhood, and, upon her second marriage, for certain trusts named

during her life, and then to G. M. absolutely. He then gave personal property in trust to pay the income to the wife until her second marriage; and upon that event "all the bequests" in her favour were to cease, and she was to receive £500 a year during her life, to be paid from the rents of the real, and any deficiency to be made up from the income of the personal, estate; and the trustees were to accumulate the balance until her death, and then pay it over in certain legacies specified. As to the residue of the whole personal property and the income thereof, and the rents from the real property accumulated at the wife's death, he gave it to T. M. absolutely. The wife married in 1854, and her annuity was paid until the present time, and the surplus accumulated. On a case made for instructions as to the disposition of the accumulation, *held*, that under Thelluson's Act, there was no valid disposition of the surplus rents and income from April 16, 1873, until the death of the wife, and T. M. was not entitled to it as residuary legatee.—*Weatherell v. Thornburgh*, 8 Ch. D. 101.

3. A testator devised the residue of his property to his wife for life, and at her death, absolutely to such of the children of his late sisters as should survive his wife, and being males should attain twenty-one, or being females should attain that age or marry. "But, in case any of such children shall be dead at my decease shall issue, then I direct that such issue shall take . . . the share of their deceased parent." *Held*, that the issue of a niece of the testator who died before the date of the will could take nothing.—*West v. Orr*, 8 Ch. D. 60.

4. A testator bequeathed to trustees "the sum of £3,000, to be applied by them in supporting or founding free or ragged schools for gutter-children, or for the poorest of the poor;" and added in a codicil, that "such school or schools should be situated in the parish of B. . . for the resident poor of said parish." For some years prior to the testator's death, there had been such a school maintained by him in a hired room in B. *Held*, that the gift was in the alternative, and that a bequest for "supporting" such a school could be made without violation of the Mortmain Act, which forbids a testamentary gift to be "laid out or disposed of in the purchase of any lands, tenements, or hereditaments" for a charity.—*In re Hedgman*. *Morley v. Grozon*, 8 Ch. D. 156.

5. A testator died possessed of, *inter alia*, £2,900 Egyptian nine-per-cent. bonds, shares in two corporations, an interest in a copyright, a leasehold house where he lived, and a leasehold house held for a term determinable on the



## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

death of one H., and a policy for £3,000 on H.'s life. By his will he gave some pecuniary legacies, made specific bequests of his plate, books, and apparel, of £2,400 of the Egyptian bonds, and of all the other property above specified. The residue he gave to his nephew A., mentioning expressly therein his carriage and furniture. After the date of his will, the testator married, and thereupon made a codicil to his will, giving his wife the income for life in all his property, postponing "the payment of all legacies, and the distribution of all estates vested in me, or over which I have any power of disposal or appointment, in Egyptian bonds, called Khedive bonds. E., the legatee of the leasehold, depending on the death of H., and on the policy on H.'s life, was to receive "all the bonuses and additions thereto," and "pay the future payments in respect thereof." By the provisions of the policy, the holder could take the bonuses either to increase the sum insured, or in part payment of the premiums. *Held* (BAGGALLAY, L. J., diss.), that the residue must be converted, and the income paid the widow during her life; that the Khedive bonds formed part of the residue, the specific legacies of the Egyptian nine-per-cent. bonds having been adeemed when the bonds were sold; that the furniture formed part of the residue; that the bonuses must be added to the capital insured; and the premiums must be raised by mortgaging the policy.—*Macdonald v. Irvine*, 8 Ch. D. 101.

See ANNUITY, 1; BEQUEST; MARRIED WOMEN, 1; TRUST, 1, 2.

WORDS.

"Levy."—See SHERIFF, 2.

"Or other inevitable Accident."—See LANDLORD AND TENANT, 1.

"Poorest," "Poor Kindred."—See BEQUEST.

"Supporting or Founding."—See WILL, 4.

—*American Law Review*.

## LAW STUDENTS' DEPARTMENT.

## EXAMINATION PAPERS.

The following are some of the questions on the Pass Papers set at the General Examination for call to the Bar in England preceding Trinity Term, 1878,

as published (with answers) in the *Bar Examination Journal*:

## EXAMINATION FOR CALL.

*Real and Personal Property.*

1. State the difference between corporeal and incorporeal hereditaments, and between easements and appurtenances, giving instances?

2. Define the different kinds of estates in land with regard to their quantity, stating which do and which do not arise by operation of law.

3. State the provisions of the Statute of Frauds respecting contracts for the sale and purchase of interests in land. A. verbally agrees to sell land to B., and receives a deposit on account of the purchase-money; he subsequently refuses to complete the sale; can B., who has not got possession, enforce the contract?

4. A., B. and C. are beneficial joint tenants in fee of land. A. desires to have one-third of the land in severalty; how shall he attain his object?

5. Sketch an assignment of a leasehold house on a sale by the original lessee, and his mortgage by demise, the debt being paid off out of the purchase-money, mentioning the proper covenants.

6. What difference is there in the effect of a feoffment without consideration to A. and his heirs, and a feoffment without consideration unto and to the use of A. and his heirs?

7. What power has a woman over real or personal property settled to her separate use without power of anticipation—(1) while married; (2) during widowhood?

8. Is it easier to dispose of a married woman's reversionary interests in personalty when they belong to her for her separate use, or when they belong to her absolutely? By what means in either case are they disposable? Does it signify at what time, or by what instrument they were created?

9. A father having personal property belonging to him absolutely, and having a general power of testamentary appointment over other personalty, and having a power of testamentary appointment amongst his issue over other personal property, by his will bequeaths, and by virtue of his power appoints all the properties unto and among all his children equally. One child dies in his lifetime, leaving issue at his death. How does the will operate?

10. Define the different kinds of estates tail, and the words by which they may be

## LAW STUDENTS' DEPARTMENT—EXAMINATION QUESTIONS.

created in deeds and wills respectively. How may such estates in freeholds and copyholds be barred?

## COMMON LAW.

1. What is the law with respect to covenants in restraint of trade? Give the effect of two or three decided cases on this subject.
2. When can a person not mentioned in a written contract sue upon it?
3. Give instances of contracts where the promise of each party is the consideration for the promise of the other.
4. Are there any and what material difference between contracts under seal and contracts not under seal? Are there any and what cases in which a contract must be under seal in order to be valid?
5. Under what circumstances can a fact be proved by affidavit upon the trial of an action?
6. Under what circumstances can a plaintiff be compelled to give security for the costs of the action? How is he compelled to give such security?
7. State what you know respecting the proceedings in an action for the recovery of land. Who ought to be made defendants?
8. When can a married woman sue in her own name, and when ought her husband to be joined as a co-plaintiff?
9. Under what circumstances and upon what trials is a dying declaration evidence?
10. Is a person ever and when not amenable to the law of England for a crime committed on the high seas?
11. Before what Courts and Judges are indictable offences tried? How is an indictment removed into the Queen's Bench Division, and, when so removed, when and before whom is the indictment tried?

## EQUITY.

1. A post-nuptial settlement is executed which does not carry into effect the intentions of the settlor. In what case will a Court of Equity after the settlor's death—
  - (a) Rectify it;
  - (b) Set it aside.
2. In what respect does the interest of a married woman, in her separate estate, differ from every other absolute interest known to the English law?

(To be continued.)

## REVIEWS.

**ELEMENTS OF INTERNATIONAL LAW.** By Henry Wheaton, LL.D., &c. English Edition. Edited with notes and an appendix of Statutes and Treaties, bringing the work down to the present time. By A. C. Boyd, Esq., LL.B., (Camb.) Barrister, &c. London: Stevens & Sons, 119 Chancery Lane, Law Publishers, 1878. Toronto: R. Carswell.

Mr. Wheaton published his first edition in 1836, dating his preface at Berlin, where he was Minister of the United States at the Court of Prussia. Another edition was published in 1846, and afterwards two French editions; other editions were published in France and the United States, and in 1857, the sixth was published at Boston by Mr. W. B. Lawrence; another appeared in 1863, and a Chinese edition in 1864. Mr. R. H. Dana, in 1866, published his edition, which was the best of that time. It was soon out of print and so remained until Mr. Boyd came to the rescue.

Though the text of the author has been preserved the book is in many respects a new one; and when one considers the rapid strides that have been made in the subjects treated of, it is manifest that a treatise to be of any use must be in effect a new one. The present editor brings the work down to the present time by giving in his notes which are numerous, the most important diplomatic transactions of recent date, the leading decisions of English, American, and Continental Courts, and the opinions of the most eminent publicists that have appeared since the author's first edition. A glance at the book will show how fully and exhaustively this has been done.

At the present time when one great war has just closed, or rather probably the first act has been played; when we seem to have been relegated to the time of Attila, or Alaric, or Mahomet, and when the blood of non-combatants has flowed in torrents; when nation seems rising up against nation, and men's hearts are failing them for fear; when the area of probable future entanglements and possibly of still more fearful conflicts

## CORRESPONDENCE.

seems rapidly extending; when as in some countries at least, there is even greater dread of internal and communistic violence than of foreign wars; when might is still right—it seems a vain thing to write learned books as to how one nation ought to comport itself to another when difficulties, misunderstandings, and quarrels, arise between them. But that man deserves well, not only of his country, but of all mankind who helps as well as he can to make more definite, and to spread the knowledge of those laws which, in their more sober moments, nations like individuals know to be for the common welfare of all.

The subject is an interesting one at any time, and especially so now, and this being the last, but by no means the least, addition to the literature of the law of nations it is especially welcome, containing as it does, the English and American Statute law of naturalization, extradition, and foreign enlistment; the English Naval Prize Act, the Treaty of Washington, and extracts from the most important treaties relating to the Black Sea, the Dardanelles and Bosphorus, and Turkish affairs.

Mr. Boyd has done his work very well indeed. He gives the text of Wheaton in full, Mr. Dana's numbering of the sections being preserved. The index, often very carelessly done in books of this nature, is better than usual.

The same publishers have also recently published a new edition of Kent's Commentary on International Law, by D. A. B. A new edition of Halleck's International Law, by Sir Sherston Baker, has also appeared. There is therefore no want of light on this subject so far as the making of many books is concerned.

"The October number of *Blackwood*," has also something to say on the subject of international relations in an article which suggests a cross between the Battle of Dorking and the Coming Race. The writer speaks in the past tense of a still future time when England shall beat ogger heads with Bœotia on the Happygoland question, and when any army can be destroyed by any other army, and *vice versa* "on sight," by some explosive compound. At this stage of the quarrel an ingenious philanthropist suggested that instead of

fighting it out in the usual blood-thirsty fashion each nation should select a hundred and five champions, and should "put up" with a neutral power the stakes following, to wit, fifty millions sterling by Bœotia and a portion of territory by England; the whole to go to the nation whose champions should be successful. The suggestion being accepted, the writer concludes by describing the selection of the champions. We shall see what came of it next month; but in the meantime we can admire the conception, and only hope that it may not happen to the two hundred and ten champions as it did to the Kilkenney cats, in which case the writer in "*Old Ebony*" would probably feel justified in laying down as a proposition of international law that the neutral power should pocket the stakes.

## CORRESPONDENCE.

To the Editor of CANADA LAW JOURNAL.

SIR,—The case of *Shannon vs. The Gore District Insurance Company*, 2 Appeal Reports, 396, will strike many members of the profession as of doubtful authority, compared with the able reasoning and sound conclusions of the late Chief Justice, whose arguments on the merits are not referred to, or even touched upon by the Court of Appeal.

Any ordinary observer knows that much real estate has changed hands, for less than the actual value, in the past few years, and from all that appears by these judgments in Appeal, this was one of those parcels, and the estimate put on it by the plaintiff more likely to be the correct one.

If this judgment in Appeal means anything, it says to the plaintiff, "You purchased this property at a low figure, and put a fictitious value on it to effect large insurances, for the purpose of defrauding the companies." A supposition not warranted by the evidence reported.

## LAW SOCIETY, TRINITY TERM.

I hope the case has been taken to the Supreme Court. It is a matter of regret that we have not also the benefit of a written judgment by the Justice of Appeal, who concurred.

HAMILTON.

## BOOKS RECEIVED.

SNELL'S Principles of Equity. Fourth Edition, by Archibald Brown. London: Stevens & Haynes.

NOVA SCOTIA REPORTS. Russell & Chesley. Law; Vol I. and parts of Vol II. Equity: part of Vol. I.

THE REVISED SCHOOL LAW. By J. George Hodgins, LL. D. Copp, Clark & Co., Toronto.

PRECEDENTS OF PLEADINGS UNDER THE JUDICATURE ACTS. By Cunningham & Mattinson. London. Stevens & Haynes.

JONES ON PRESCRIPTIONS. A Practical Treatise on the Real Property Limitation Act. Carwell & Co., 28 Adelaide Street, Toronto.



## Law Society of Upper Canada.

OSGOODE HALL,

TRINITY TERM, 42ND VICTORIAE.

During this Term, the following gentlemen were called to the Bar; namely:—

HENRY PIGOTT SHEPPARD.  
ISAAC CAMPBELL.  
A. BRISTOL AYLSWORTH.  
RICHARD DULMAGE.  
HARRY THATCHER BECK.  
MATTHEW WILSON.  
WILLIAM HENRY FERGUSON.  
WILLIAM E. HIGGINS.  
JAMES CARRUTHERS HEGLER.  
FREDERICK WILLIAM PATTERSON.  
EUGENE LEWIS CHAMBERLAIN.  
MAXFIELD SHEPPARD.  
NEIL A. RAY.

And the following gentlemen were admitted as Students of the Law and Articled Clerks, namely:—

## Graduates.

WILLIAM RIDDELL.  
DAVID PHILIP CLAPP.

ADAM JOHNSTON.  
GEORGE GORDON MILLS.  
GEORGE WILLIAM BEYNON.  
JOHN HENRY MAYNE CAMPBELL.  
CHARLES MILLAR.  
THOMAS ALFRED O'ROURKE.  
EDWARD ROBERT CHAMBERLAIN PROCTOR.  
CONRAD BITZER.  
JOHN RUSSELL.  
JOHN WILLIAM RUSSELL.

## Matriculants.

W. J. TAYLOR.  
HARRY THORPE CANNIFF.  
THOMAS PARKER.  
A. DOUGLAS PONTON.  
ALBERT EDWARD DIXON.

And as an Articled Clerk—

EUDO SAUNDERS.

## Junior Class.

J. L. MURPHY.  
A. G. CLARKE.  
W. B. DICKSON.  
W. G. WALLACE.  
T. K. PORTEOUS.  
D. H. TENNENT.  
M. S. McCRAVEY.  
J. TELFORD.  
C. H. CLEMENTI.  
W. HAWKE.  
J. B. PATTERSON.  
J. W. HANNA.  
C. H. CLINE.  
G. W. DANKS.  
C. A. HESSON.  
R. E. HARDING.  
C. HENDERSON.  
J. CAMPBELL.  
J. G. CHEYNE.  
F. E. BERTRAND.  
T. MOFFAT.  
S. O. RICHARDS.

## Articled Clerks.

A. F. GODFREY and  
HUGH McMILLAN, as of Easter Term.

## LAW SOCIETY, TRINITY TERM.

PRIMARY EXAMINATIONS FOR  
STUDENTS-AT-LAW AND ARTICLED  
CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

## CLASSICS.

Xenophon, *Anabasis*, B. I.; Homer, *Iliad*, B. I.; Cicero, for the *Manilian Law*; Ovid, *Fasti*, B. I., vv. 1-300; Virgil, *Æneid*, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

## ENGLISH.

A paper on English Grammar; Composition; an examination upon "The Lady of the Lake," with special reference to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

*Optional Subjects instead of Greek:*

## FRENCH.

A Paper on Grammar. Translation of Simple Sentences into French Prose. Corneille, Horace, Acts I. and II.

## Or GERMAN.

A Paper on Grammar. Musæus, *Stumme Liebe*. Schiller, *Lied von der Glocke*.

Candidates for Admission as Articled Clerks (except Graduates of Universities and Students

at-Law), are required to pass a satisfactory Examination in the following subjects:—

Ovid, *Fasti*, B. I., vv. 1-300; or, Virgil, *Æneid*, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

A student of any University in this Province who shall present a certificate of having passed within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

All examinations of students-at-law or articled clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

After Hilary Term, 1879, the Matriculation Examination will be as follows:—

## SUBJECTS OF EXAMINATION.

*Junior Matriculation.*

## CLASSICS.

1879 { Xenophon, *Anabasis*, B. II.  
Homer, *Iliad*, B. VI.

1879 { Caesar, *Bellum Britannicum*.  
Cicero, *Pro Archia*.  
Virgil, *Eclog.* I., IV., VI., VII., IX.  
Ovid, *Fasti*, B. I., vv. 1-300.

1880 { Xenophon, *Anabasis*, B. II.  
Homer, *Iliad*, B. IV.

1880 { Cicero, in *Catilinam*, II., III., and IV.  
Virgil, *Eclog.* I., IV., VI., VII., IX.  
Ovid, *Fasti*, B. I., vv. 1-300.

1881 { Xenophon, *Anabasis*, B. V.  
Homer, *Iliad*, B. IV.

1881 { Cicero, in *Catilinam*, II., III., and IV.  
Ovid, *Fasti*, B. I., vv. 1-300.  
Virgil, *Æneid*, B. I., vv. 1-304.

Translation from English into Latin Prose.

Paper on Latin Grammar, on which special stress will be laid.

## MATHEMATICS.

Arithmetic; Algebra, to the end of Quadratic Equations; Euclid, Bb. I., II., III.

## LAW SOCIETY, TRINITY TERM.

## ENGLISH.

A paper on English Grammar.  
Composition.

Critical analysis of a selected poem :—

1879.—Paradise Lost, Bb. I. and II.

1880.—Elegy in a Country Churchyard and  
The Traveller.

1881.—Lady of the Lake, with special refer-  
ence to Cantos V. and VI.

## HISTORY AND GEOGRAPHY.

English History from William III. to George  
III. inclusive. Roman History, from the com-  
mencement of the Second Punic War to the death  
of Augustus. Greek History, from the Persian  
to the Peloponnesian Wars, both inclusive.  
Ancient Geography: Greece, Italy, and Asia  
Minor. Modern Geography: North America  
and Europe.

## Optional Subjects.

## FRENCH.

A Paper on Grammar.

Translation from English into French Prose—

1878 }  
and } Souvestre, Un philosophe sous les toits.  
1880 }

1879 }  
and } Emile de Bonnechese, Lazare Hoche.  
1881 }

## GERMAN.

A Paper on Grammar.

Musaeus, Stumme Liebe.

1878 }  
and } Schiller, Die Bürgschaft, der Taucher.  
1880 }

1879 }  
and } Schiller { Der Gang nach dem Eisen-  
1881 } hammer.  
{ Die Kraniche des Ibycus.

## INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Inter-  
mediate Examination shall be :—Real Property,  
Williams; Equity, Smith's Manual; Common  
Law, Smith's Manual; Act respecting the Court  
of Chancery (C. S. U. C. c. 12), C. S. U. C. caps.  
42 and 44, and Amending Acts.

The Subjects and Books for the Second Inter-  
mediate Examination shall be as follows :—Real  
Property, Leith's Blackstone, Greenwood on the  
Practice of Conveyancing (chapters on Agree-  
ments, Sales, Purchases, Leases, Mortgages, and  
Wills); Equity, Snell's Treatise; Common Law,  
Broom's Common Law, C. S. U. C. c. 88, and

Ontario Act 38 Vic. c. 16, Statutes of Canada,  
29 Vic. c. 28, Administration of Justice Acts  
1873 and 1874.

## FINAL EXAMINATIONS.

## FOR CALL.

Blackstone, Vol. I., containing the Introduc-  
tion and the Rights of Persons, Smith on Con-  
tracts, Walkem on Wills, Taylor's Equity Juris-  
prudence, Stephen on Pleading, Lewis's Equity  
Pleading, Dart on Vendors and Purchasers,  
Best on Evidence, Byles on Bills, the Statute  
Law, the Pleadings and Practice of the Courts.

## FOR CALL, WITH HONOURS.

For Call, with Honours, in addition to the  
preceding :—Russell on Crimes, Broom's Legal  
Maxims, Lindley on Partnership, Fisher on Mort-  
gages, Benjamin on Sales, Hawkins on Wills,  
Von Savigny's Private International Law (Guth-  
rie's Edition), Maine's Ancient Law.

## FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's  
Mercantile Law, Taylor's Equity Jurisprudence,  
Smith on Contracts, the Statute Law, the Plead-  
ings and Practice of the Courts.

Candidates for the Final Examinations are  
subject to re-examination on the subjects of the  
Intermediate Examinations. All other requisites  
for obtaining Certificates of Fitness and for Call  
are continued.

## SCHOLARSHIPS.

1st Year. — Stephen's Blackstone, Vol. I.,  
Stephen on Pleading, Williams on Personal  
Property, Hayne's Outline of Equity, C. S. U. C.  
c. 12, C. S. U. C. c. 42, and Amending Acts.

2nd Year. — Williams on Real Property, Best  
on Evidence, Smith on Contracts, Snell's Treatise  
on Equity, the Registry Acts.

3rd Year. — Real Property Statutes relating to  
Ontario, Stephen's Blackstone, Book V., Byles  
on Bills, Broom's Legal Maxims, Taylor's Equity  
Jurisprudence, Fisher on Mortgages, Vol. I. and  
chaps. 10, 11, and 12 of Vol. II.

4th Year. — Smith's Real and Personal Property,  
Harris's Criminal Law, Common Law Pleading  
and Practice, Benjamin on Sales, Dart on Ven-  
dors and Purchasers, Lewis's Equity Pleadings  
Equity Pleading and Practice in this Province,

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# INDEX.

---

	PAGE.
Abandonment of excess—Effect of .....	144
Acts of last Session .....	164
Administrator— <i>See</i> Executor and administrator.	
Agency—Liability of freight agent.. ..	18
Agreement—	
Construction of—Property passing .....	24
Breach of—Waiver.....	28
To take stock in company, effect of .....	114
Reformation of—Evidence .....	246
Alderson, Baron, and the trumpeters.....	282
Antwerp Conference .....	165
American authorities, citation of .....	89
Appeals—	
In England .....	255
When will lie for costs .....	283
Arbitration and Award—	
Powers of arbitrator—Damages .....	60
Reference to—Payment into court—Practice .....	170
By consent—Time for moving against .....	221
Assault—	
Witness in case of common assault. ....	97, 165
On judges .....	160
Constructive .....	261
Assessment—Omission of name .....	120
Assignee—Right of, to office-room in court house. ....	42
Assignment—Of chose in action— <i>See</i> same.	
Attachment of debts—Order for—Affidavit—Practice .....	169
Attorneys—	
Striking off the roll.....	138
Lien of town agent .....	142
Reduction of fees payable by .....	307
Bankruptcy—Repeal of bankrupt law in United States .....	189
Bell, Mr. Archibald—Appointment of as County Judge .....	208
Bench and Bar—	
Status of Bar in Russia .....	40, 227
“          in England .....	161
Duties of judges—Case law .....	40
Rights of counsel .....	42
Judges by descent .....	54
Unprofessional advertisements .....	137
Assaults on civil judges .....	160
Devils of the English bar .....	239
Recent judicial appointments .....	307, 310
Emoluments of Judges .....	320



	PAGE
Bills and Notes—	
Liability of agent .....	17
Illegal consideration .....	24, 60
Stamps affixed by executor—Pleading .....	26
Application to re-stamp .....	57
Liability of indorser .....	107
“ of president of club .....	113
Mortgage as collateral security .....	116
Release of indorser by giving time .....	120
Material alteration of .....	121, 218
Cairns, Lord—Promotion of .....	298
Cameron, Hon. M. C.—Appointment of as puisne judge .....	311
Capital punishment—	
In France .....	277
The black cap at criminal trials .....	277
Carriers—Liability of .....	56, 114
Cause of action .....	283
Certiorari—Identifying magistrates .....	16
Chancery, Court of—Jurisdiction—Fusion of law and equity .....	35
Chattel Mortgage—	
Renewal of—Insufficient affidavit .....	21, 22
Seizure before default, effect of .....	25
Verbal assent of mortgagee to parting with goods .....	115
Insufficient description .....	174
Securing mortgagee against endorsements .....	222
Chelmsford, Lord—Sketch of his life .....	286
Chose in action—Assignment of .....	231
Christianity, is a part of law of Ontario .....	219
Contract—	
New term in—Statute of frauds .....	23
Mercantile, interpretation of .....	57
Foreign—Jurisdiction .....	221
Controverted Elections—	
Power of judge to add voters .....	111
Admissions received as evidence .....	111
Publication pending scrutiny—Contempt .....	111
Recount of ballots .....	298, 322
Conveyance, fraudulent .....	248, 263
Conveyancing—	
Made easy .....	32
Cheap .....	308
Coroners—Review of treatise on duties of .....	254
Corporation—Liability of successors—Practice .....	168
CORRESPONDENCE—	
Fusion of law and equity .....	33, 35, 131
Lectures of the Law Society .....	68
Stop orders— <i>Wilson v. McCarthy</i> .....	185
Dissenting judgments .....	204
Primary examination questions .....	205
Precedents .....	253
Interest on notes after maturity .....	276
Chief Justice Osgoode .....	305
The case of <i>Shannon v. The Gore District Insurance Company</i> .....	332
Costs—	
In actions of trespass .....	19
Powers of arbitrator as to .....	28

<i>Notes—(continued.)</i>	PAGE
Security for—Receiver of bankrupt company .....	121
Of examination of judgment debtor .....	168
Of application to sell equitable interest .....	170
Leading principles in awarding .....	210
Privileged claim .....	217
<i>Counsel fees—</i>	
Assignment of .....	119
Action for .....	213
<i>Criminal laws—</i>	
Criminal information—New trial .....	16, 81
Conviction—Joint penalty .....	17
“ Neglect to maintain wife .....	22
Administration of unorganized districts .....	81
Setting aside arrest— <i>Ca. sa.</i> .....	121
Review of manual of .....	158
Length of criminal trials .....	161
In Quebec .....	230
<i>Digest of English Reports—</i>	
For February, March and April, 1877 .....	61, 89, 124
For May, June and July, 1877 .....	145
For August, September and October, 1877 .....	174
For November and December, 1877 .....	194
For February, March and April, 1878 .....	265
For May, June and July, 1878 .....	298, 323
Dissenting judgments .....	43, 98, 105, 137
<i>Distress for rent—</i>	
Distress clauses in mortgages .....	8
For taxes—Notice .....	117
By landlord .....	121
<i>Division Court—</i>	
Executions in—Growing crops .....	18
New trial in—When may be granted .....	55
Final notice before proceeding in .....	160
Jurisdiction of .....	172, 312
Report of inspector for 1877 .....	229
Resolutions of local law societies as to jurisdiction and working of .....	313, 314
Divorce, law of .....	230
Dominion Parliament—Acts of last session .....	164
<i>Dower—</i>	
Intention of testator—Election by widow .....	84
Right to, saleable under <i>fi. fa.</i> .....	85
Computation of value of .....	85
Bar of—Notice of motion—Practice .....	88
Averment of seizure—Pleading .....	245
<i>Easement—</i>	
Right of way—Construction of will .....	23
Right to lateral support .....	25
Agreement to grant—Performance .....	118
<i>EDITORIALS—</i>	
Fusion of law and equity .....	1
Distress clauses in mortgages .....	1, 8
Plaintiffs in person .....	1
Landlord and tenant—Notice to quit .....	2
Appointment of legal juveniles .....	2
Law students and articled clerks .....	2
Supreme Court .....	3
Revised statutes of Ontario .....	4, 69
Court of Appeal .....	42, 97
Irish law reports .....	42
Official assignee .....	42

**EDITORIALS—(Continued.)**

	PAGE
Rights of counsel .....	41
Dissenting judgments .....	43, 97
Furnished apartments .....	45
Law school .....	69
New trial for improper reception or rejection of evidence .....	72
Specific performance .....	74
Unprofessional advertisements .....	137
Prisoners giving evidence on their own behalf .....	97
Attack on a Judge .....	97
Guardian and ward .....	163
Acts of last Session .....	165
Antwerp conference .....	165
Mr. Justice Wilson .....	189
Queen's Bench business .....	189
Notes on time .....	190
Notes on recent decisions .....	209
Concerning costs .....	210
Fictitious appeals .....	229
Report of Division Court Inspector for 1877 .....	229
Chief Justice Harrison .....	229, 281
Criminal law of Quebec .....	230
Law of divorce .....	230
Assignment of choses in action .....	230
Interest of notes after maturity .....	231
Increase of jurisdiction in lunacy .....	235
Appeals in England .....	255
Death of Henry William May .....	255
Proof of foreign law .....	256
Appointment of Mr. Jetté as judge .....	256
Is a debt secured by promissory note garnishable .....	256
Prisoners giving evidence on their own behalf .....	281
Baron Alderson and the trumpeters .....	282
Recent municipal cases .....	282
Cause of action .....	283
Garnishing surplus moneys .....	283
When an appeal will lie for costs .....	285
The charitable spirit of the law .....	285
Lord Chelmsford .....	28
The Maritime Court of Ontario .....	37
Wandering through Osgoode Hall .....	37
Recent judicial changes .....	37
Cheap conveyancers .....	38
Division Court jurisdiction .....	313
Osgoode Hall and Toronto of old .....	317
<b>Ejectment—</b>	
Right to possession—Compensation .....	24
Equitable defence in—A. J. Act, 1873 .....	25, 119
Amendment by adding party .....	120
<b>Election—See Controverted election.</b>	
<b>Equity, fusion of law and .....</b>	<b>33, 131</b>
<b>Estate tail, bar of—Consent of protector .....</b>	<b>215</b>
<b>Evidence—</b>	
Field-notes, when admissible as .....	13
Improper reception of—New trial for .....	72
Of defendant in case of assault .....	97
Of expert—Validity of marriage .....	256
<i>See</i> Witnesses.	
<b>Examination Questions .....</b>	<b>30, 66, 68, 92, 128, 157, 183, 205, 251, 303, 330</b>
<b>Exchequer Court—suggestion as to sittings of .....</b>	<b>4</b>
<b>Executions—Priority of .....</b>	<b>18</b>

	PAGE
Executor and administrator—	
Foreign law—Widow administratrix .....	87
Liability of for negligence .....	87
When chargeable with compound interest .....	109
February, twenty-ninth of—Its legal existence .....	296
Fictitious Suit—Practice .....	172
Firemen, misconduct of—Who liable .....	261
FLOTHAM AND JETSAM—	
<i>See</i> end of each number.	
Forcible entry—Restitution, of .....	219
Forensic medicine and toxicology. By Woodman & Tidy—Review .....	38
Frauds, Statute of—	
Sale of goodwill—Damages .....	114
Guarantee that note would be paid .....	173
<i>See</i> Warranty.	
Fusion of law and equity discussed .....	1, 35, 131
Garnishee—Is debt secured by note garnishable ....	255
Guardian and ward—Lease by guardian void .....	163
Hagarty, Chief Justice—Appointment of, as Chief of Queen's Bench .....	310
Harrison, Chief Justice—	
Illness of .....	229
Death of .....	281
Judicial career of .....	308
Highways—	
Accretions to land—Private rights .....	15
Right to original allowance .....	215
Want of repair—Contributory negligence .....	219
Obstructions on .....	282
Holidays, Legal—Their use and abuse .....	319
Husband and Wife— <i>See</i> Married Woman.	
Indictment— <i>See</i> Criminal law.	
Infants—Religious Education of .....	20
Injunction—By simple contract creditor .....	297
Inland Revenue Act—	
Conviction under .....	117
Right of Crown to sue .....	214
Insolvency—	
Double proof .....	18, 145
Joint and separate creditors .....	21
Composition and discharge—Pleading .....	80, 82
Sureties for assignee—Proceedings against .....	86
Objections to deed of composition .....	108
Fraudulent preference .....	109, 110
Garnishment after assignment .....	144
Damages on cancellation of lease .....	145
Law of, in United States .....	189
Goods claimed by insolvent administratrix .....	214
Accommodation endorser—Right to security .....	217
Priority of claims .....	217
Increased risk—Agency—Waiver .....	223
Right of insolvent to retain watch .....	241
Acts as to—B. N. A. Act—Jurisdiction .....	242
Transfer of stock .....	245
Debt barred by discharge .....	263

	PAGE
<b>Insurance—</b>	
Existing insurances—Notice to agent .....	14, 220
Agency—Concealment .....	16
General average in marine policies .....	17
Company incorporated by Dom. Act—39 Vict. ch. 24 (0) .....	17
Mis-statement in description—Evidence .....	19, 220
Stamp duty—Powers of Local Legislatures .....	55
Guarantee to provide watchman .....	84
Re-insurance—Misrepresentation .....	110, 224
Double insurance—Knowledge of agent .....	111
Compromise of claim—Effect of .....	174
Concealment—Excessive valuation .....	220
Further insurance—Estoppel .....	224
Interim receipt—Insurable interest .....	245
Suicide—Obvious danger—Evidence .....	247
Over valuation .....	332
<b>Interest, upon interest .....</b>	<b>50</b>
On notes after maturity .....	231, 276
On legacies .....	86
<b>International Law—</b>	
Proceedings of Antwerp conference .....	155
Review of work on .....	331
<b>Interpleader—Delay in giving security .....</b>	<b>218</b>
<b>Jettè, Mr. Justice—Appointment of .....</b>	<b>256</b>
<b>Joint Stock Company—</b>	
Indictment of, for neglect to repair Road .....	82
Calls on Stock—Computation of Time .....	224
<b>Justice of Peace—Our unpaid magistracy .....</b>	<b>236</b>
<b>Keogh, Mr. Justice—</b>	
Death of .....	255
Incidents in life of .....	292
<b>Laframboise, Hon. Maurice—Appointment of to judgeship .....</b>	<b>236</b>
<b>Landlord and tenant—</b>	
Notice to quit—Service on tenant's widow .....	3
Use and occupation—Insolvency .....	15
Purchase by landlord at bailiff's sale .....	36
Tenant claiming as owner .....	7
Surrender of lease—Authority of wife .....	2
Law as to furnished apartments .....	45
Breach of covenant—Forfeiture .....	111
Liability of surety for rent .....	112
Covenant to repair—Tempest .....	225
<b>Law, Charitable Spirit of the .....</b>	<b>285</b>
<b>Law Society—</b>	
Resumé Mich. Term, 1878 .....	95
Hilary Term, 1878 .....	189, 228
Easter Term, 1878 .....	255
Trinity Term, 1878 .....	280, 306, 333
<b>Law Students—</b>	
Department set apart in <i>Law Journal</i> for .....	2
Results of examinations of .....	31, 91
Examination questions .....	30, 66, 92, 128, 157, 183, 205, 251, 274, 303, 330
<b>Life Estate—Land devised subject to .....</b>	<b>20</b>
<b>Limitations, Statute of—</b>	
As to easements .....	23
Possession under .....	23, 220
Covenant in mortgage .....	56
Action on judgment .....	83
Work and labour—Disability .....	113
<b>Malpractice—Evidence of .....</b>	<b>245</b>

	PAGE
Master and Servant—	
Relation of .....	224
Wages—Action for.....	226
Maritime Court of Ontario .....	287
Marriage—	
Procured by fraud .....	261
Breach of promise of.....	279
Married Woman—	
Separate estate of .....	21, 26, 215, 220
Conviction of, for illegal sale of liquor .....	82
Separate liability as endorser .....	220
Goods supplied to wife—Separate trading .....	83
May, Death of Henry William.....	255
Mechanics' Lien—	
Lien of sub-contractor .....	85
Priority to mortgages.....	88
Mortgage—	
Distress clause in .....	8
Action on covenant in.....	17
Lands in Ontario and Quebec .....	85
Second, subject to lis pendens .....	86
Consent of encumbrancers to sale.....	87
Purchase by mortgagee.....	114
Ejectment by mortgagee .....	143
Sale by mortgagee—Distribution of surplus .....	171
Collateral security to bank .....	216
Municipal Law—	
Basis of county assessment .....	16
Municipal act, section 447—Drainage by-law .....	81
Liability of corporation—Contract .....	123
Surety for corporation—Disqualification .....	144
Obligation of County Council to build bridge .....	213
Jurisdiction of Court of Chancery to test validity of by-law .....	214
Corporation—Accident—Liability .....	222
Recent cases in .....	
By-law—Closing up road—Corporation.....	246
Unlawful taxation—Ultra vires .....	250
Liability of municipality for injury by surface water.....	248
“                    “                    for misconduct of firemen .....	261
Murder, constructive.....	258
Negligence—	
Contributory—Liability of corporation.....	119
By railway company—Use of air-brake.....	139
Negotiable Instrument—Title of holder of .....	102
See Bills and Notes.	
NOTES OF CASES.....	13, 56, 80, 108, 144, 173, 212, 245, 263, 297, 32
Notes on recent decisions .....	139, 209
Notice of trial—Irregularity.....	169, 170
See Practice.	
Osgoode, Hon. William, engraving of .....	305
Osgoode Hall and Toronto of Old .....	317
Osgoode Literary and Debating Society—Proceedings of.....	130
Parnassus—A summons from .....	192
Partition of water privilege .....	174
Partnership—	
When inferred.....	118
Law of .....	278
Patent, Infringement of—Element of invention.....	14

	PAGE
Penalty—Relation of Law to .....	39
Plaintiff in person .....	1
Pleading—Contract—Condition—Precedent .....	26
Policemen—Misconduct of—Who liable .....	261
Possession—Title by—Estoppel .....	115
Practice—	
Parties—Interpleader .....	20
Appeal from award .....	20
Rule of court, Easter Term, 1877 .....	39
Notice of trial pending re-hearing .....	79
Dismissal of bill for want of prosecution .....	123
Order to examine—'At issue' .....	170
Amending bill at hearing .....	321
Precedents—Conflict of .....	253
Principal and agent—Agent of intending purchaser .....	321
Prisoners—Testimony of, on their own behalf .....	281
Privileged communication .....	217
Promissory note—See Bills and notes.	
Prosecution, malicious—Action for .....	117
Railway Company—	
Right of way—Agency of solicitor .....	20
Shareholders in—Action of <i>act. fa.</i> .....	60, 225
Contract of—Performance .....	115
Negligence by—Use of air-brake .....	139
Residence of .....	172
Covenant to keep station .....	213
Conditional subscription for shares .....	214
Parol contract to carry in covered cars .....	225
Reports, English—See Digest.	
REVIEWS—	
Forensic medicine and toxicology .....	38
Blackwood .....	39
The Legal News .....	68
The Magistrates' Manual .....	136
Digest of Ontario reports .....	136
Void judicial sales .....	158
A manual of criminal law .....	158
The doctrines of the law of contract in their principal outlines .....	159
American criminal reports .....	159
The Canadian monthly and national review .....	187
The constable's manual .....	207
Mayne's treatise on damages .....	207
American law review .....	207
The English quarterly reviews and Blackwood .....	207
The voters' list act with notes .....	208
Short studies of great lawyers .....	253
A practical treatise on the office and duties of coroners in Ontario .....	254
Elements of international law .....	331
Revised Statutes of Ontario .....	5, 69
Right of way—See Easement.	
School Sections—	
Union of—Illegal formation .....	27
Township by-law for forming board .....	246
Seduction—Damages in action of .....	22, 113
SELECTIONS—	
Interest upon interest .....	50
Judges by descent .....	54
Title of holders of negotiable instruments .....	102

	PAGE
<b>SELECTIONS—(Continued.)</b>	
Dissentient opinions .....	105
Three great law-breakers .....	193
Our unpaid magistracy .....	236
"Devils" of the English bar .....	239
Breach of promise .....	240
Constructive murder .....	258
Official costume .....	260
Marriage procured by fraud .....	261
Liability of city for acts of officers .....	261
Constructive assault .....	261
Dignity of the Bench .....	261
Mr. Justice Keogh .....	292
The promotion of Lord Cairns .....	294
Has 29th February a legal existence .....	296
Use and abuse of legal holidays .....	319
Judicial emoluments .....	320
Sheriff—Official costume of .....	260
Solicitors—See Attorneys.	
Specific performance .....	74
Stakeholder—Lien on deposit—Interpleader ....	28
Stop-orders—Discussion of cases bearing on .....	185
Stoppage in transitu—Insufficient notice .....	18
Striking off the roll .....	138
Summons from Parnassus .....	192
Supreme Court—Delay in judgments—Residence of judges—Improvements ...	3, 4
Taschereau, J. P.—Resignation of seat in Supreme Court .....	307
Taschereau, H. E.—Appointment of, to Supreme Court .....	307
Taschereau, H. T.—Appointment of, to judgeship in Quebec .....	307
Taxes, sale of land for—	
Insufficient description .....	22, 213
Wrong lot sold .....	80
Indian land—Surrender to Crown .....	82
Temperance Act of 1864—	
Insufficient notice .....	17
Assessment rolls used in voting .....	82
Conviction under—Conflict of jurisdiction .....	218
Temperance question—Suggested bill as to .....	189
Text books—Average value of .....	278
Theaiger, Mr.—Appointment of, as Lord Justice of Appeal .....	2, 40
Timber—Right to, after patent issued .....	58
Time—Notes on .....	190
Toronto of Old—Review of .....	317
Trade Mark, what may constitute .....	264
Trespass—Right to crops .....	80
Trustees—	
Discretion of .....	85
Disposal of land belonging to lunatic .....	88
Vendor and purchaser—	
Bond to indemnify from mortgage .....	86
Waiver of right to enquire into title .....	110
Verdict rendered by mistake .....	57
Voters' list—Defects in .....	21
Wages—See Master and servant.	

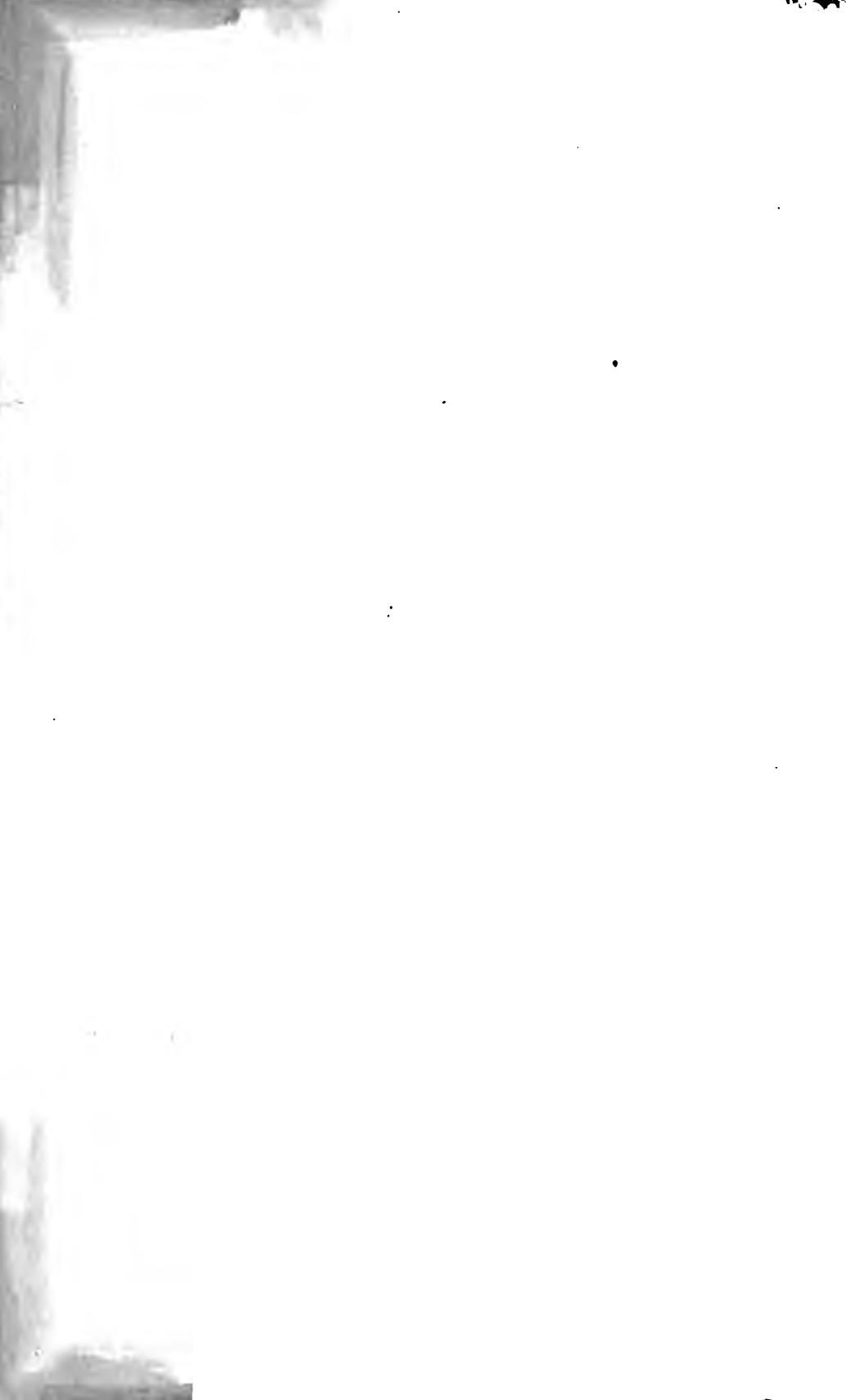


	PAGE
Warranty—	
Implied in patented machine .....	58
Breach of—Statute of frauds .....	215
Weatherbee, Mr. R. N.—Appointment to judgeship in Nova Scotia .....	308
Wethey, Mr. H. C.—Death of.....	163
Will—	
Description of property in—Parol evidence .....	83
Construction of—Heirs and next of kin .....	84
Interest on legacies .....	86
Inaccurate description of legatees .....	87
Declaration against interest.....	218
Construction of—Conversion .....	297
Wilson, Mr. Justice—Appointment of as C. J. C. P. ....	310
Witnesses—	
Power of examiner to exclude.....	30
Changes in law as to competence of .....	97, 165, 281
Tampering with—Conviction—Ultra vires .....	112





















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